No. 17-530	
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Lower Ct:	United States Court of Appeals for the Seventh Circuit
Case Numbers:	(16-3300, 16-3303, 16-3304)
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Rehearing Denied:	July 12, 2017
Questions Presented	

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Mar 07 2018	CIRCULATED
Mar 19 2018	Brief of respondent United States filed. (Distributed) **Proof of Service** **Main Document**

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IN THE

Supreme Court of the United States

WISCONSIN CENTRAL LTD.; GRAND TRUNK WESTERN RAILROAD COMPANY; AND ILLINOIS CENTRAL RAILROAD COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Railroad Retirement Tax Act, 26 U.S.C. § 3231(e)(1), defines taxable "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee."

Petitioners' employees obtained stock when they exercised stock options granted by petitioners. The Seventh Circuit—agreeing with the Fifth Circuit but in direct conflict with the Eighth Circuit—held that stock is "money remuneration" and hence taxable "compensation."

The question presented is:

Whether stock that a railroad transfers to its employees is taxable under the Railroad Retirement Tax Act, 26 U.S.C. § 3231(e)(1).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel states that petitioners Wisconsin Central Ltd., Grand Trunk Western Railroad Company, and Illinois Central Railroad Company are all indirect wholly-owned subsidiaries of Canadian National Railway Company, a publicly-traded corporation.

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PETITION FOR A WRIT OF CERTIORARI

Wisconsin Central Ltd., Grand Trunk Western Railroad Company, and Illinois Central Railroad Company respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The Seventh Circuit's opinion (App. 1a) is reported at 856 F.3d 490. The Seventh Circuit's order denying rehearing or rehearing en banc (App. 14a) is not reported. The order and opinion of the district court granting summary judgment (App. 16a) is reported at 194 F. Supp. 3d 728.

JURISDICTION

The Seventh Circuit entered its judgment on May 8, 2017, and denied petitioners' timely petition for rehearing or rehearing en banc on July 12, 2017. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Railroad Retirement Tax Act, 26 U.S.C. § 3231(e)(1), provides, in relevant part:

> (e) Compensation—For purposes of this chapter—
>
> > (1) The term 'compensation' means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers.

Section 3231(e)(1) is reproduced in full at the back of this brief, App. 43a.

INTRODUCTION

The Seventh and Fifth Circuits have split with the Eighth Circuit on an important question of federal law: whether stock is taxable "compensation" under the Railroad Retirement Tax Act ("the RRTA"). The Seventh and Fifth Circuits hold that stock acquired through the exercise of nonqualified stock options *is* taxable compensation. *See* App. 4a-5a; *BNSF Ry. Co. v. United States*, 775 F.3d 743 (5th Cir. 2015). The Eighth Circuit, in contrast, holds that it is *not* taxable compensation—and has expressly recognized the circuit split. *See Union Pac. R.R. Co. v. United States*, 865 F.3d 1045, 1052 (8th Cir. 2017) (acknowledging that the Seventh Circuit has reached the opposite conclusion, but stating that "[w]e respectfully disagree" and "decline to follow the Seventh Circuit's lead").

The circuits' disagreement turns on the words "money remuneration." Enacted during the Great Depression, the RRTA imposes a payroll tax on railroad employers and employees, and defines taxable "compensation" as "any form of *money remuneration* paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. § 3231(e)(1) (emphasis added). One side of the split holds that "money remuneration" should be read broadly to encompass stock. In the words of Judge Posner, writing for the Seventh Circuit, because "there is no significant economic difference" between receiving $1,000 in cash and $1,000 worth of stock, the statute should be interpreted in a way that "makes good practical sense." App. 3a-5a.

The other side of the split gives "money remuneration" its plain-language meaning: cash, or some other generally recognized medium of exchange,

but not stock. As the Eighth Circuit put it, after reviewing dictionaries and examples of contemporaneous legal usage, and after examining the statute's structure and history, "the ordinary, common meaning" of "money" is a generally recognized medium of exchange. *Union Pacific*, 865 F.3d at 1049. "Like any type of property," the court explained, "stock does have cash value and can be exchanged for money, but we do not think it is a medium of exchange." *Id.* at 1052. No one pays for groceries with stock.

The acknowledged conflict over this important question of federal tax law has created an untenable situation in which a railroad in Illinois must pay tens of millions of dollars in federal taxes based on the transfer of stock to its employees, whereas a railroad across the Mississippi River in Missouri does not. Because most of the nation's major railroads issue stock options as a way to incentivize employees, this is a significant and recurring question that affects not just the railroads, but thousands of railroad employees who face millions of dollars in potential tax liability.

STATEMENT

Petitioners are railroads who filed suit seeking refunds of taxes they paid when their employees exercised stock options. The Seventh Circuit rejected petitioners' claims, holding that the stock was "money remuneration"—and hence taxable "compensation"—under the RRTA.

A. The RRTA

Whereas most employers pay and withhold taxes under the Federal Insurance Contributions Act ("FICA"), Congress exempted railroads from FICA

and instead made them subject to a railroad-specific statute—the Railroad Retirement Tax Act, 26 U.S.C. §§ 3201-3241. Enacted in 1937 during the Great Depression, the RRTA (named the "Carriers' Taxing Act" at the time) imposes a payroll tax on both the employer and employee, with the proceeds used to pay retirement and disability benefits under the Railroad Retirement Act, 45 U.S.C. §§ 231-231v.

The RRTA requires railroads to pay an excise tax equal to a specified percentage of its employees' "compensation," and also to withhold a specified percentage of that compensation as the employees' share of the tax. *See* 26 U.S.C. § 3201(a)-(b) (tax on railroad employees); *id.* § 3221(a)-(b) (tax on railroad employers). The RRTA defines "compensation" as "any form of *money remuneration* paid to an individual for services rendered as an employee to one or more employers." *Id.* § 3231(e)(1) (emphasis added).

Congress enacted the RRTA to federalize the railroads' pension obligations, which were in jeopardy given the nation's severe economic turmoil. *See* Kevin Whitman, *An Overview of the Railroad Retirement Program*, 68 Soc. Sec. Bull. 41, 41 (2008) (noting that "more than 80 percent of railroad workers were employed by companies with existing pension plans," but "the Great Depression drove the already unstable railroad pension system into a state of crisis"). Because the planned Social Security system would not cover work performed before 1937, and was not scheduled to begin paying benefits for years in any event, Congress elected to create a separate and distinct system for railroad retirement. *Id.* That approach was consistent with Congress' historic practice of enacting railroad-specific statutes

reflecting the railroads' unique role and history in the life of our nation.[1]

Congress's decision to confine the RRTA tax to "money remuneration" reflects its intent to maintain the then-existing pension structure of the railroad industry. At the time, the railroads' pension plans were based on an employee's regular compensation only—that is, money remuneration (salary and bonus) rather than in-kind benefits. *See* 1 Murray Latimer, *Industrial Pension Systems in the United States and Canada*, at 20 (1933) (railroad pensions funded by percentage of "salaries"); *id.* at 21 (railroad pensions measured by "average annual pay"); *see also* The Atchison, Topeka and Santa Fe Pension System, *Railway Age*, at 15 (Jan. 4, 1907) (explaining that railroad pensions are calculated with respect to "average monthly pay"). The nation's railroads used this pension structure even though railroads, as far back as the nineteenth century, had also provided their employees with stock and other non-monetary benefits, such as food and lodging. Thus, in enacting the RRTA, Congress chose to take over the railroads' obligations while preserving the industry's familiar pension structure in which pensions were funded based on an employee's *salary*, rather than the employee's receipt of stock or in-kind benefits.

That Congress made a deliberate choice in restricting "compensation" under the RRTA to "money remuneration" is further illustrated by the language it used in FICA, 26 U.S.C. §§ 3101-3128. There are high-level similarities between the RRTA and FICA.

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[1] Examples include the Federal Employers Liability Act, 45 U.S.C. § 51 et seq., which addresses injuries suffered by railroad workers, and the Railway Labor Act, 45 U.S.C. § 151 et seq., which governs labor relations in the industry.

Both impose payroll taxes on employers to ensure the funding of retirement and disability benefits. But even granting that the two statutes share a general purpose, they use very different language in setting the tax base. As noted above, the RRTA taxes "compensation," which it defines as "any form of *money* remuneration paid to an individual for services rendered." 26 U.S.C. § 3231(e)(1) (emphasis added). FICA, in contrast, taxes "wages," which it defines as "*all* remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." *Id.* § 3121(a) (emphasis added).

The difference in language was not happenstance. Congress adopted the "money remuneration" standard used in the RRTA the very same month—August 1935—that it adopted, as part of the Social Security Act, the "all remuneration" standard used in FICA.[2] The fact that in a single month, Congress created two retirement tax-law regimes—but used different language to describe the tax bases—underscores that its use of "money remuneration" was a conscious and purposeful choice. The difference results from the fact that the RRTA was designed as a replacement for the existing railroad pension plans that were based on salary rather than non-monetary compensation, whereas in FICA Congress was writing on a blank slate.

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[2] In August 1935, Congress enacted the "money remuneration" standard in a version of the RRTA that was soon struck down. *See* Pub. L. No. 400, 74th Cong., 1st Sess. § 1(d), 49 Stat. 974 (1935); *Alton R.R. Co. v. R.R. Ret. Bd.*, 16 F. Supp. 955 (D.D.C. 1936). Congress then used the same "money remuneration" standard in the version of the RRTA it passed in 1937—the version that stands today.

In the decades since its enactment, Congress has amended the RRTA on numerous occasions. Among other recent changes, Congress created various exemptions to RRTA "compensation." *See, e.g.*, 26 U.S.C. § 3231(e)(4)-(12). But the provision at issue in this case, the one that establishes the RRTA's tax base—"money remuneration"—remains unchanged.

B. Factual Background

The three petitioners—Wisconsin Central Ltd., Illinois Central Railroad Company, and Grand Trunk Western Railroad Company—are subsidiaries of Canadian National Railway Company ("CN") with significant operations in the midwestern United States and the Mississippi Valley. All are rail carriers subject to the RRTA. App. 17a.

Petitioners have issued stock options to their employees since the mid-1990s. SA 10.[3] Each option gave the employee the right to purchase one share of CN stock at a fixed exercise price—the "strike" price—equal to CN's publicly traded stock price as of the date the option was granted. SA 6. Thus, the value of an option—unlike the value of a cash salary—depends on the future performance of the company, as reflected in its publicly-traded share price. SA 11.

Petitioners issued stock options because stock options incentivize employees in a way that money payments do not. SA 10-11. Stock options "encourage[ ] employees to work harder for the company, because the better the company does the more valuable its stock is." App. 3a. Petitioners

[3] "SA" citations refer to the jointly-stipulated statement of facts the parties filed in the district court, which was then submitted as part of petitioners' Separate Appendix in the Seventh Circuit (ECF No. 13).

designed their stock option plans to align the economic interests of their employees with the growth of the CN business enterprise as a whole, as part of what it called the Canadian National Railway Company Management Long-Term Incentive Plan. SA 10-11.

The stock options generally had a ten-year term, terminable early if the employee ceased employment with a CN affiliate. SA 6, 11. Most of the options could be exercised at any time during the ten-year term, although some could be exercised only if CN achieved specified financial benchmarks. SA 8-10.

Employees could choose to receive their shares in different ways. SA 6-7. They could pay cash to cover the exercise price, tax withholdings and administrative costs, then have the shares transferred to their personal brokerage account to be held as a stock investment. SA 7. They could have a transfer agent sell enough shares to cover the exercise price, tax withholdings and broker and administrative costs, then have the remaining shares transferred to their personal brokerage account to be held as a stock investment. *Id.* Or they could have the shares sold and the cash proceeds wired to their bank account, less the exercise price, tax withholdings and broker and administrative costs. *Id.* Regardless of the method the employees chose, petitioners only transferred stock—not money—to their employees.

Petitioners issued options to many of their executives and managers, as well as to some of their rank-and-file employees. SA 12. Most recipients chose to hold their stock options for a lengthy period—on average, more than six years—and even when they exercised the options, they then held the stock itself for a lengthy period. *Id.*

Finally, the stock options at issue in this case were "nonqualified" options. In 2004, Congress amended the RRTA by adding a provision entitled "[q]ualified stock options." *See* 26 U.S.C. § 3231(e)(12). The new language provided that "[t]he term 'compensation' shall not include any remuneration on account of a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b)), or any disposition by the individual of such stock." *Id.* (internal numbering omitted).

C. The Decision Below

In 2014, petitioners filed the instant action seeking refunds of approximately $13 million in taxes they had paid or withheld when nonqualified stock options were exercised between 2006 and 2013. App. 17a-20a. Petitioners claimed both the employer tax paid by themselves, as well as the amount they withheld from the employees and paid to the IRS.[4]

The parties cross-moved for summary judgment based on a stipulated factual record. App. 17a. The district court sided with the government, denying the refunds. The court held that the statute was ambiguous and that the government's interpretation was entitled to deference under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). App. 37a-38a.

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[4] There is no dispute that the stock options, upon exercise, gave rise to taxable income to the employees subject to income tax withholding. This case presents the distinct question whether the stock also constitutes "money remuneration" subject to *RRTA* withholding. The income taxation of stock is not at issue in this case.

A split panel of the Seventh Circuit affirmed. Noting that the RRTA was enacted during the Great Depression, the court admitted that "[m]aybe stock then wasn't a form of money remuneration" and thus would not have been taxable under the original meaning of the statute. App. 3a-4a. However, the court reasoned, "there is no reason to think that the framers and ratifiers of the Act meant money remuneration to be limited to cash even if, as was eventually to happen, stock became its practical equivalent." App. 4a. In short, the court explained, "sheep may have once been a form of money; now stock is." *Id.*

The court deemed the Internal Revenue Code of 1939—which it conceded "treats 'money' and 'stock' as different concepts"—to be "of limited help here." App. 4a. Instead, it looked to the provision concerning *qualified* stock options, which was enacted in 2004, nearly 70 years after the RRTA was enacted, as "signal[ing]" the "equivalence of stock to cash." *Id.* Finally, the court emphasized that, regardless of the statutory text, "[t]he government's position also makes good practical sense." *Id.*

Judge Manion dissented. He faulted the majority's "speculat[ion] about the intent of Depression-era legislators," explaining that "our job is to interpret the Act as it would have been understood by people at the time it was enacted." App. 6a. "If the stock options at issue wouldn't have been money remuneration in 1935," he stated, "neither should they be in 2017." App. 7a. Analyzing the words "money remuneration" in light of the meaning they carried when the statute was enacted, Judge Manion concluded that "the plain language of the statute's

definition of 'compensation' does not cover stock or stock options." App. 6a.

Petitioners timely sought rehearing, which was denied over a dissent by Judge Manion. App. 14a-15a.

REASONS FOR GRANTING THE PETITION

The circuits have split on the question whether stock is "money remuneration"—and hence taxable "compensation"—under 26 U.S.C. § 3231(e)(1). The Eighth Circuit has expressly acknowledged the split, *see Union Pac. R.R. Co. v. United States*, 865 F.3d 1045, 1052 (8th Cir. 2017), as has the United States itself. *See* U.S. Pet. for Reh'g at 1, 865 F.3d 1045 (No. 16-3574) ("The [Eighth Circuit's] ruling . . . conflicts with *Wisconsin Central* and *BNSF*, which reached the opposite conclusion on the same issue.") (citations omitted).

This Court should grant review to resolve this significant and recurring question of federal tax law. In the balance are millions of dollars in potential tax liability for railroads and the thousands of their employees who own employer-issued stock options. This Court has long underscored the importance of a nationally uniform tax system. *See, e.g.*, *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948). The current state of affairs—in which stock is taxable in some circuits but not in others—is untenable.

I. The Circuits Are Split On An Important Question Of Federal Tax Law.

A. The Seventh And Fifth Circuits Hold That Stock *Is* Taxable Compensation.

The Seventh Circuit, as discussed above, held that stock is "money remuneration" within the meaning of 26 U.S.C. § 3231(e)(1). The court reasoned that

because stock has become the "practical equivalent" of money, stock acquired through the exercise of nonqualified stock options is taxable "compensation" under the RRTA. App. 4a.

The Fifth Circuit has reached the same conclusion, although through different reasoning. In *BNSF Railway Co. v. United States*, 775 F.3d 743, 757 (5th Cir. 2015), the court held that stock acquired through the exercise of nonqualified stock options is "properly taxed as compensation under the RRTA." The court deemed the phrase "money remuneration" to be ambiguous, stating that it "does not appear to us to have an ordinary, common-sense definition." *Id.* at 751-52. The court acknowledged that "most dictionaries offer narrow definitions that confine 'money' to 'a medium of exchange,' and define 'medium of exchange' as 'anything generally accepted as payment in a transaction and recognized as a standard of value.'" *Id.* at 752 (footnotes omitted). The court further acknowledged that "the modifier 'money' must narrow [the word 'remuneration'] to some degree," and that the RRTA and FICA "use somewhat different formulations of the word 'compensation.'" *Id.* at 752, 755-56. But it nonetheless concluded that Congress had not spoken clearly and that the government's interpretation was entitled to deference under *Chevron*. *Id.* at 757.[5]

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[5] A district court has also adopted the position taken by the Fifth and Seventh Circuits. In *CSX Corp. v. United States*, No. 3:15-cv-427 (M.D. Fla. March 14, 2017), the court held that whereas "the term compensation as used in the RRTA is unclear in scope," the government's interpretation "does not contradict the clear intent of Congress." *Id.* at 11-12.

B. The Eighth Circuit, In Contrast, Holds That Stock Is *Not* Taxable Compensation.

The Eighth Circuit has expressly rejected the conclusion reached by the Fifth and Seventh Circuits, and has held that stock is not "money remuneration," and therefore is not taxable compensation under 26 U.S.C. § 3231(e)(1).

In *Union Pacific*, 865 F.3d at 1053, the Eighth Circuit held that "the RRTA unambiguously does not require payment of RRTA taxes on remuneration in stock." The court focused on the critical textual difference between FICA and the RRTA, observing that "FICA sweeps more broadly than the RRTA: The FICA expressly mentions the cash value of remuneration not paid in cash, such as payments in property, whereas the RRTA does not." *Id.* at 1048. Looking to dictionaries, as well as to 1930s-era caselaw and regulations, the court explained that the word "money" typically meant currency or a generally accepted medium of exchange. *Id.* at 1049.

The court rejected the government's argument that "various non-cash exemptions from the general definition of 'compensation' show that 'money remuneration' means something broader than just mediums of exchange or else the exemptions would be superfluous." 865 F.3d at 1050. The court pointed out that the exemptions post-dated the statutory definition of "money remuneration" by decades. *Id.* at 1052. Moreover, because each of the exemptions could include money payments, none of them would become superfluous even if "money remuneration" was limited to cash or medium-of-exchange payments. *Id.* at 1050.

Finally, the Eighth Circuit acknowledged its disagreement with the Seventh Circuit. "We recognize that one of our sister circuits recently held that payments in stock are a form of money remuneration because stock has become practically equivalent to cash," the court stated, but "[w]e respectfully disagree." 865 F.3d at 1052. "Even stocks with readily ascertainable share prices are not 'money' because they are not mediums of exchange." *Id.* Thus, the court concluded "we decline to follow the Seventh Circuit's lead." *Id.*

II. The Court Below Disregarded The RRTA's Text, Structure, Purpose And History In Order To Reach A Result It Thought Made "Good Practical Sense."

The panel majority below did not engage in close analysis of the statutory text and did not adhere to the meaning of the words at the time they were written. Instead, it adopted the outcome it thought made "good practical sense." App. 5a. That is not how this Court reads statutes. To the contrary, this Court has held that statutory text must be given its plain meaning as of the time it was written. "It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) (quotation marks omitted); *see also Perrin v. United States*, 444 U.S. 37, 42 (1979) ("[W]e look to the ordinary meaning of the [relevant words] at the time Congress enacted the statute.").

The plain meaning of "money" is cash, or a recognized medium of exchange. Investment property, such as stock or real estate, can be bought and sold for money, but is not itself money, even when

that property has a readily-ascertainable market value. That was so in 1937—and it remains so today. Stock is not used as currency or as a medium of exchange.

That the word "money" in the RRTA excludes stock is confirmed by dictionaries of the era, as well as by contemporaneous legal usage. Dictionaries from the 1930s define "money" as a common and recognized medium of exchange. *See, e.g.*, WEBSTER'S NEW INT'L DICTIONARY 1583 (2d ed. 1934) ("money" is "anything having a conventional use as a medium of exchange"); BOUVIER'S LAW DICTIONARY 814 (1934) ("money" includes "coins" and other "common medium[s] of exchange in a civilized nation"). Likewise, caselaw from that era establishes that "[t]here is no doubt that the word 'money' when taken in its ordinary and grammatical sense does not include corporate stocks." *In re Boyle's Estate*, 37 P.2d 841, 842 (Cal. Ct. App. 1934).

The 1939 version of the Internal Revenue Code—which contains the codified versions of the RRTA's and FICA's tax provisions—repeatedly distinguishes between "money" (which has a fixed value) and other "property" (which has a fluctuating value). *See, e.g.*, I.R.C. §§ 111(b), 112(c) (1939). Even the original IRS regulation implementing the RRTA's tax provisions indicated that "money" refers to mediums of exchange; it defined "compensation" to include "all remuneration in money, or in something which may be used in lieu of money (scrip and merchandise orders, for example)." 2 Fed. Reg. 2198, 2202 (Oct. 15, 1937).

Moreover, the difference between the RRTA and FICA—"money remuneration" versus "all remuneration"—highlights the significance of the

word "money," and demonstrates that its inclusion in the statute was a deliberate choice. "[I]t is axiomatic that such notable linguistic differences in two otherwise similar statutes are normally presumed to convey differences in meaning." *United States v. Smith*, 756 F.3d 1179, 1186 (10th Cir. 2014) (Gorsuch, J.). Here, the notable linguistic difference shows that Congress intended to establish a narrower tax base for the RRTA, and conform the new federal pension structure to the longstanding salary-based railroad pension structure, by excluding all forms of remuneration other than "money."

The interpretation advanced by the government—in which *anything* could be "money," even a birthday cake (App. 3a)—has no limiting principle and reads the word "money" out of the statute. Indeed, the government urged the court below simply to treat the word "money" as surplusage and effectively delete it. *See* U.S. CA7 Br. at 35 ("the phrase 'money remuneration' is reasonably construed as meaning merely remuneration"). Although the Seventh Circuit rejected the government's interpretation as "go[ing] too far," App. 3a, the court offered no limiting principle for its own broad reading of "money remuneration."

The Seventh Circuit also relied on the list of exemptions to "compensation," including the exemption that refers to "[q]ualified stock options," 26 U.S.C. § 3231(e)(12). In the court's view, those exemptions show that "money remuneration" cannot be limited to cash or medium-of-exchange remuneration because otherwise the exemptions would be superfluous. The court's analysis is erroneous. The "qualified" stock option provision was added in 2004, *70 years* after Congress enacted the

RRTA, so it cannot shed light on the original meaning of "money remuneration." As the dissent pointed out, if the statutory text before 2004 did not make stock taxable—and it did not—then the mere addition of the later exceptions would not impliedly repeal the original meaning of "money remuneration." App. 10a-12a; *see also Union Pacific*, 865 F.3d at 1052 (rejecting the argument that "these later-adopted exemptions would impliedly repeal our reading of the original definition of 'money remuneration'"). Congress would not dramatically alter tax obligations in such an indirect, roundabout way. And looking to later enactments as a way of shedding light on original meaning only is permissible when the original meaning is ambiguous, which is not the case here. *See* App. 12a.

Moreover, as the Eighth Circuit has explained, all of the exemptions address situations where cash payments *could* be included. For example, with regard to the qualified stock option exemption, "cash payments sometimes accompany the exercise of a stock option, as, for instance, when the number of shares an employee can acquire at exercise is not a whole number, or if the remunerative program under which the option was transferred gives employees bonuses or additional compensation, in cash or other property, at the time of exercise." *Union Pacific*, 865 F.3d at 1050. So too with the exemption for health and disability insurance. That exemption excludes "any *payment*" made to, or on behalf of, an employee on account of sickness, accident, or hospitalization or any related insurance. 26 U.S.C. § 3231(e)(1)(i) (emphasis added). Thus, interpreting the words "money remuneration" as meaning cash or its equivalent does not render the exemptions superfluous.

The government cannot support its reading by relying on Treasury Department regulations. The Department has defined "compensation" for purposes of the RRTA as having "the same meaning as the term wages in [FICA] . . . *except as specifically limited by the [RRTA].*" 26 C.F.R. § 31.3231(e)-1 (emphasis added). As shown above, the RRTA contains a "specific[ ] limit[ation]"—unlike FICA, which applies to "all" remuneration, the RRTA applies only to "money" remuneration. Thus, stock is not "compensation" under the regulation.

Even if the regulation could be read the way the government claims—as making RRTA "compensation" and FICA "wages" essentially identical—it would not be entitled to deference. It fails *Chevron* step one because it is contrary to the unambiguous language of the statute. And it fails *Chevron* step two because it is not a permissible interpretation in any event. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (even under *Chevron*, "agencies must operate within the bounds of reasonable interpretation") (quotation marks omitted). The RRTA's text, structure, purpose and history all establish that stock is *not* "money remuneration"—a conclusion reinforced by the original IRS regulation that interpreted the phrase for more than 50 years after the statute was enacted. *See* 2 Fed. Reg. at 2202.

III. The Question Presented Is Exceptionally Important.

Whether stock is "money remuneration" under the RRTA is an exceptionally important and recurring question of federal tax law over which there is an acknowledged circuit split. Resolving the question will determine whether the railroads—and the

thousands of railroad employees who hold stock options—are subject to millions of dollars in tax liability. Absent further review by this Court, taxpayers in different states will be subject to different IRS enforcement regimes.

Because the question is squarely presented, and because the Seventh Circuit's decision was based on a jointly-stipulated factual record, this case is the ideal vehicle for resolving what the United States has deemed an issue of "exceptional importance." U.S. Pet. for Reh'g at 1, 865 F.3d 1045 (No. 16-3574).

A. Resolving This Important And Recurring Question Is Necessary To Ensure A Nationally Uniform Tax Law.

This Court has long emphasized the importance of a nationally uniform tax law and avoiding arbitrary and disparate treatment in the application of the Internal Revenue Code. In *Sunnen*, 333 U.S. at 599, the Court explained that when one taxpayer "is accorded a tax treatment different from that given to other taxpayers of the same class," the result is "inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion."

For those reasons, the circuit split over whether stock is taxable "compensation" under the RRTA cannot be allowed to stand. Under the current state of affairs, railroads in the Eighth Circuit (such as Union Pacific, based in Nebraska) will face *no* tax liability under the RRTA when their employees' stock options are exercised, whereas railroads in the Fifth or Seventh Circuits (such as BNSF, based in Texas; or petitioners, based in Illinois) face millions of dollars in tax liability for the same transaction.

Compounding the confusion and unfairness is the fact that, separate and apart from the RRTA taxes paid by the railroad employers, their *employees* residing in different circuits will have different tax liability. Many railroads operate in multiple states and their employees are scattered throughout the network. In petitioners' case, an employee who resides in Chicago will be required to pay tax when exercising stock options, whereas an employee who resides in Minneapolis will not.

Resolution of the question presented will have broad consequences for railroad employers, their employees, and the government. Many railroads issue significant volumes of stock options to their employees. This case, for example, involves approximately $13 million in potential tax liability to petitioners and more than 600 of their employees at all levels of the company. Indeed, the United States has deemed this issue "one of exceptional importance" given "the volume of railroad compensation paid in stock" and hence the "significant tax revenue" at issue. U.S. Pet. for Reh'g at 1, 865 F.3d 1045 (No. 16-3574).

Finally, this case raises important questions about the method of statutory interpretation used by the Seventh Circuit. The panel majority acknowledged that stock was not "money remuneration" at the time the RRTA was enacted, but declined to give those words their original meaning at the time the statute was written. App. 4a. Whether a court may jettison the original meaning of statutory text in favor of an interpretation the court believes "makes good practical sense," App. 5a, is a serious question that itself warrants this Court's review.

B. This Case Is The Ideal Vehicle For Deciding The Question Presented.

This case is a perfect vehicle for resolving the circuit split over whether stock is "money remuneration" under the RRTA. Petitioners have pressed the question presented at all stages of this case and it was fully briefed by the parties. The Seventh Circuit squarely decided the question—indeed, it was the *sole* issue on appeal and the *sole* basis for decision—and the majority opinion and dissent lay out the competing interpretations of the statute, as does the lengthy district court opinion. *See* App. 1a-5a, 5a-13a, 16a-42a. The Seventh Circuit entered a final judgment and there are no further proceedings to be had in the district court, as petitioners' refund request was denied in its entirety.

This case is an ideal vehicle for the additional reason that the district court and the court of appeals decided it on a jointly-stipulated set of relevant facts. *See* App. 17a. Consequently, the record is clean and there are no factual disputes that could cloud the legal issues. Because the factual record is not just fully developed but *undisputed*, the legal question is squarely presented for this Court's resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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October 6, 2017

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 16-3300, -3303, -3304

WISCONSIN CENTRAL LTD.,
ILLINOIS CENTRAL R.R. CO., AND
GRAND TRUNK WESTERN R.R. CO.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. Nos. 14 C 10243, 10246, 10244 — **Gary Feinerman**, *Judge*.

ARGUED MARCH 30, 2017 — DECIDED MAY 8, 2017

Before POSNER, MANION, and HAMILTON, *Circuit Judges*.

POSNER, *Circuit Judge*. Beginning in 1996, the plaintiff-appellants, subsidiaries of the Canadian National Railway Company (to simplify we'll refer to the subsidiaries as "the railway"), began including stock options in the compensation plans of a number of employees. In this suit against the government, the railway argues that income from the exercise of stock options that a railroad gives its employees is not a form of "money remuneration" to them and is therefore not taxable to the railway as compensation under the Railroad Retirement Tax Act, 26 U.S.C. § 3231(e)(1), which defines "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." See also *BNSF Railway Co. v. United States*, 775 F.3d 743 (5th Cir. 2015).

As explained in *Standard Office Building Corp. v. United States*, 819 F.2d 1371, 1373 (7th Cir. 1987), "the Railroad Retirement Tax Act, passed in 1937, is to the railroad industry what the Social Security Act is to other industries: the imposition of an employment or payroll tax on both the employer and the employee, with the proceeds used to pay pensions and other benefits. ... The Act requires the railroad to pay an excise tax equal to a specified percentage of its employees' wages, and also to withhold a specified percentage of its employees' wages as their share of the tax. The railroad retirement tax rates are much higher than the social security tax rates."

The question presented by this case is whether the excise tax should be levied not only on employees' wages but also on the value of stock options exercised by employees who, having received the options from their employer, exercise them when the market price

exceeds the "strike price" (the price at which the employee has a right to buy the stock) and thus obtain the stock at a favorable price. The Internal Revenue Service answers yes, see 26 C.F.R. § 31.3231(e)-1, and the district court agreed, precipitating this appeal.

The lawyer for the IRS told us at oral argument that anything that has a market value is a "form of money remuneration." That goes too far; it would impose a tax liability on an employer who bought an employee a birthday cake, even though the employee could do nothing with his cake except eat it or give it away. But if instead he exercises a stock option, he now owns stock, and stock has so well-defined a monetary value in our society that there is no significant economic difference between receiving a $1000 salary bonus and a share or shares of stock having a market value of $1000.

By compensating an employee with stock options rather than cash the employer encourages the employee to work harder for the company, because the better the company does the more valuable its stock is. The value of a company's stock is a function of the company's profitability, whereas the size of a cash bonus, once it is given, is unaffected by the company's future business successes or failures. Underscoring the point, we note that the railway's stock-option plans are performance-based: they can be exercised only if the company achieves specified goals.

As the discussion in the preceding paragraphs implies, the fact that cash and stock are not the same things doesn't make a stock-option plan any less a "form of money remuneration" than cash. Indeed the railway offers its employees a choice to have an agent

exercise an employee's stock option, sell the shares of stock obtained by that exercise of the option, reserve part of the money received in the sale for taxes and administrative costs, and deposit the balance in the employee's bank account. An employee who uses this method will thus experience the stock option as a cash deposit.

It's true that the Railroad Retirement Tax Act, in which the term "money remuneration" appears, dates back to 1935, when the nation was mired in the Great Depression of the 1930s which had driven down the value of corporate stock. Maybe stock then wasn't a form of money remuneration, but there is no reason to think that the framers and ratifiers of the Act meant money remuneration to be limited to cash even if, as was eventually to happen, stock became its practical equivalent, just as today 100 dimes is the exact monetary equivalent of a $10 bill. A $10 bill is paper; so is a stock certificate that can be sold for $10. The dictionary definition of money may remain constant while the instruments that comprise it change over time: sheep may have once been a form of money; now stock is. The Internal Revenue Code of 1939 is of limited help here; it treats "money" and "stock" as different concepts, but that's not inconsistent with stock options' falling within "any form of money remuneration."

The equivalence of stock to cash is actually signaled in the statutory exception for *qualified* stock options, explicitly divorced from "money remuneration" by 26 U.S.C. § 3231(e)(12). That exception, by virtue of its narrowness, supports an inference that *non-qualified* stock options, which are the options at issue in this case, are covered by the

term "money remuneration" and are therefore taxable. There are moreover other statutory exceptions for other forms of non-cash employee benefits, and their existence reinforces the inference that non-qualified stock options are "money remuneration" and therefore taxable. See, e.g., § 3231(e)(1) (excluding payments for health insurance or health care and travel expenses); (e)(5) (excluding non-cash employee achievement awards); (e)(6) (excluding educational benefits); (e)(9) (excluding value of meals and lodging provided to employees); and (e)(10) & (11) (excluding contributions for medical and health savings plans).

The government's position also makes good practical sense by avoiding the creation of a tax incentive that might distort the ways in which employers structure compensation packages for their managers. And finally we are not alone in equating non-qualified stock options to money remuneration in the Railroad Retirement Tax Act. See *BNSF Railway Co. v. United States*, *supra*, 775 F.3d at 757; *CSX Corp., et al. v. United States*, No. 3:15-cv-427-BJD-JRK (M.D. Fla. March 14, 2017).

AFFIRMED.

MANION, *Circuit Judge*, dissenting. The railroad plaintiffs have sought a tax refund on the ground that stock options they provided to their employees aren't taxable as "compensation" under the Railroad Retirement Tax Act. Compensation under the Act is defined as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. § 3231(e)(1). The railroads argue that stock options aren't "money

remuneration," so they are not taxable as "compensation" under the Act.

The court disagrees. Although it admits that "[m]aybe stock ... wasn't a form of money remuneration" when the RRTA was enacted, the court posits that "there is no reason to think that the framers and ratifiers of the Act meant money remuneration to be limited to cash" in the event of future economic changes. Maj. Op. at 4. Even if that were true, our job is to interpret the Act as it would have been understood by people at the time it was enacted, not to speculate about the intent of Depression-era legislators. Because the plain language of the statute's definition of "compensation" does not cover stock or stock options, I respectfully dissent.

"It is a 'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'" *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). "That means we look to the meaning of the word at the time the statute was enacted, often by referring to dictionaries." *Jackson v. Blitt & Gaines, P.C.*, 833 F.3d 860, 863 (7th Cir. 2016) (citations omitted). There are some "common law statutes" whose meaning may evolve over time, such as the Sherman Antitrust Act. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007). But neither party has argued that the RRTA falls into that category, and the specific contrast Congress drew between it and the Federal Insurance Contributions

Act (FICA) belies this contention. Thus, we must interpret the RRTA using normal principles of statutory interpretation, giving effect to the words Congress chose. If the stock options at issue wouldn't have been money remuneration in 1935, neither should they be in 2017.

As the statute is written, it is clear that "money remuneration" does not include stock options. For one, as I alluded to above, "it is well established that RRTA and FICA are parallel statutes." *BNSF Ry. Co. v. United States*, 775 F.3d 743, 754 (5th Cir. 2015). But they are not identical; they contain different definitions of what is taxable. The RRTA subjects to taxation "compensation," defined as "any form of *money remuneration* paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. § 3231(e)(1) (emphasis added). FICA, on the other hand, taxes "wages," which are "*all remuneration* for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." *Id.* § 3121(a) (emphasis added).

We must give effect to Congress's distinction between "money remuneration" and "all remuneration." "After all, it is axiomatic that such notable linguistic differences in two otherwise similar statutes are normally presumed to convey differences in meaning." *United States v. Smith*, 756 F.3d 1179, 1186 (10th Cir. 2014) (Gorsuch, J.); see also *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530 (1982) ("[A]lthough two statutes may be similar in language and objective, we must not fail to give effect to the differences between them."). The court's result

effectively reads this contrast out of the statutes, rendering the words "money" and "all," as well as the two references to "cash" in the FICA definition, mere surplusage. That is "always a disfavored result in the business of statutory interpretation." *Smith*, 756 F.3d at 1186. "While it is possible that [these differences were] inadvertent, that possibility seems remote given the stark difference that was thereby introduced into the otherwise similar texts." *United States v. Ressam*, 553 U.S. 272, 277 (2008).

The difference in the statutes reveals that "money," when contrasted with "all," is a word of limitation. Further, its original meaning would not have encompassed company stock or stock options. The contemporary Webster's Second Dictionary defined "money" principally as "[m]etal, as gold, silver, or copper, coined, or stamped, and issued by recognized authority as a medium of exchange." Webster's New International Dictionary of the English Language 1583 (2d ed. 1934). More generally, money was "[a]nything customarily used as a medium of exchange and measure of value, as sheep, wampum, copper rings, quills of salt or of gold dust, shovel blades, etc." *Id.* Its synonyms were "cash," "currency," and "legal tender." *Id.* In other words, media of exchange issued by a recognized authority. Simply put (and as the court somewhat

acknowledges), money remuneration meant remuneration in cash or cash equivalents.[1]

Furthermore, the Internal Revenue Code of 1939, which included for the first time the definitions of "compensation" and "wages" under the RRTA and FICA, consistently treated money and stocks separately. One example is Section 115, which governed distributions by corporations. It said that when a distribution is payable "either (A) in its stock

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[1] The court concedes that "money" isn't everything with a monetary value. Maj. Op. at 2-3. The value of this concession is limited. There is a market for everything, even the birthday cake that the court points to as the quintessential non-money item. The only difference between the birthday cake (and personal property, for that matter) and a share of stock is that the latter's value is more easily discoverable (because it's listed on a public exchange). But what about stock in a closely-held corporation, the value of which is not so obvious to the public? The court's result requires drawing a distinction on this non-textual basis. Interpreting the statute as it was originally understood avoids this problem.

Moreover, although it's true that the stock options are not taxed until they are exercised (meaning that the employee purchases the stock at the strike price), it seems strange to call a stock option "money remuneration" when its value is so contingent on future performance. While a share of stock in a publicly traded company has a well-known value, a stock option's value isn't quite the same thing. If an employee receives an option to purchase one share of Canadian National stock at $50 per share, but the stock plunges to $40 per share the next day and remains there during the length of the option, the option would be worthless. Although it would never be taxed in that instance, it would also not be of much value to the employee, who would have preferred "money remuneration."

or in rights to acquire its stock ... or (B) in money or any other property (including its stock or in rights to acquire its stock)," then the distribution shall be considered a taxable dividend "regardless of the medium in which paid." 1939 Code, § 115(f)(2). Section 115(h)(1) said that such a distribution would not be considered a "distribution of earnings or profits of any corporation" if "no gain to such distributee from the receipt of such stock or securities, property or money, was recognized by law." See also *Helverling v. Credit Alliance Corp.*, 316 U.S. 107, 112 (1942) (Section 115(h) was inapplicable "because the distribution here was in *property and money* and *not in stock or securities*" (emphases added)). And Section 1857 defined a safe deposit box as "any vault, safe, box, or other receptacle, of not more than 40 cubic feet capacity, used for the safe-keeping or storage of jewelry, plate, *money*, specie, bullion, *stocks*, bonds, *securities*, valuable papers of any kind, or other valuable personal property." (emphases added). Examples are plentiful throughout the Code. This supports the conclusion that the original meaning of "money" did not encompass either stocks or stock options.[2]

The court relies on later-enacted statutory exceptions—principally a 2004 exception for qualified

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[2] Furthermore, the RRTA was enacted during the Great Depression, when corporate stock would not have been understood to be as liquid as it is today. Employees in the 1930s would not have taken it kindly had they been asked to accept company stock options in lieu of money remuneration. That lends credence to the conclusion that stock and stock options were not money remuneration.

stock options added to both the RRTA and FICA—to draw an inference that "money remuneration" is broader than its original meaning suggests. However, "absent a clearly established congressional intention, repeals by implication are not favored." *Branch v. Smith*, 538 U.S. 254, 273 (2003) (plurality opinion) (citations and internal quotation marks omitted). Implied repeal can occur only: "(1) [w]here provisions in the two acts are in irreconcilable conflict;" and "(2) if the later act covers the whole of the subject of the earlier one and is clearly intended as a substitute." *Posadas v. National City Bank of N.Y.*, 296 U.S. 497, 503 (1936).

Neither exception to the presumption against implied repeal is applicable. First, there is no conflict between a general definition and an exception that might cover things the general definition doesn't cover. In *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1402 (2014), the Supreme Court explained that, under the broad FICA "wages" definition, a statutory "command that all severance payments be treated 'as if' they were wages for income-tax withholding is in all respects consistent with the proposition that at least some severance payments are wages." After all, "the statement that 'all men shall be treated as if they were six feet tall does not imply that no men are six feet tall.'" *Id.* (quoting *CSX Corp. v. United States*, 518 F.3d 1328, 1342 (Fed. Cir. 2008)). The converse of this is that an exception might exclude, for whatever reason, something the general definition already omits. There might be any number of explanations for this. Congress might have wanted to fill a potential gap without revisiting the general definition. In any event, there is no conflict between

the general provisions and the exceptions, as both are consistent with the excepted forms of remuneration not being "money remuneration." Moreover, there can be no serious contention that an exception to a definitional statute "covers the whole subject" of the original definition, so the second exception to the presumption against implied repeal is also inapplicable.

To be sure, "the implication of a later enactment ... will often change the meaning that would otherwise be given to an *earlier provision that is ambiguous*." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 330 (2012) (emphasis added). However, the definition of "compensation" in the RRTA is not ambiguous with respect to the question presented here. As I have demonstrated, the original meaning of "money remuneration" was limited to cash and cash equivalents and did not include stock or stock options. Because the definitional statute is unambiguous, the later enacted exceptions cannot alter its meaning.

In sum, Congress has long treated railroads differently than other industries. See, e.g., Federal Employers Liability Act, 45 U.S.C. § 51 *et seq.*; Railway Labor Act, 45 U.S.C. § 151 *et seq.* In the labor relations context, the Supreme Court has cautioned that "parallels between the [National Labor Relations Act] and the [Railway Labor Act] ... should be drawn with the utmost care and with full awareness of the differences between the statutory schemes." *Chic. & N. W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 579 n.11 (1971). For whatever reason, the RRTA is another example of this. Given the increased liquidity of corporate stock, it may be long past time to remove

the word "money" from the definition of compensation under the RRTA, but we lack the power to do so where Congress has declined.[3] Therefore, I would hold that the non-qualified stock options provided to employees of these railroads are not taxable as compensation under the RRTA.

I respectfully dissent.

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[3] I must point out that, although I would hold the non-qualified stock options non-taxable under the RRTA, the proceeds from the sale of stock are of course taxable under generally applicable laws when the employee makes a profit. From the railroads' perspective, of course, they would avoid paying the tax on their end of the transaction.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 12, 2017

Before

RICHARD A. POSNER, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

No. 16-3300, 16-3303, 16-3304

WISCONSIN CENTRAL LTD., ILLINOIS CENTRAL R.R. CO., and GRAND TRUNK WESTERN R.R. CO.,	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Plaintiffs-Appellants,	Nos. 14 C 10243, 10246, 10244
v.	Gary Feinerman, *Judge.*
UNITED STATES OF AMERICA,	
Defendant-Appellee.	

ORDER

On June 22, 2017, plaintiffs-appellants filed a petition for rehearing and rehearing *en banc*. A

majority of the judges on the original panel have voted to deny the petition and none of the active judges has requested a vote on whether to rehear the case *en banc*.* The petition is therefore **DENIED**.

* Circuit Judge Daniel A. Manion voted to grant the petition for rehearing. For the reasons stated in my dissent from the panel opinion and in the Railroads' petition for rehearing, I would grant the petition. In my opinion, the panel's majority opinion creates an intra-circuit conflict over the proper method of statutory interpretation. This case is thus worthy of another look.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WISCONSIN CENTRAL LTD.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

14 C 10243

Judge Gary Feinerman

GRAND TRUNK WESTERN RAILROAD COMPANY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

14 C 10244

Judge Gary Feinerman

ILLINOIS CENTRAL RAILROAD COMPANY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

14 C 10246

Judge Gary Feinerman

MEMORANDUM OPINION AND ORDER

In these consolidated and materially identical suits, Plaintiffs Wisconsin Central Ltd., Grand Trunk Western Railroad Company, and Illinois Central Railroad Company seek refunds for allegedly overpaid federal employment taxes under the Railroad Retirement Tax Act ("RRTA"), 26 U.S.C. §§ 3201-3241. Doc. 1. (Unless indicated otherwise, all docket numbers refer to *Wisconsin Central Ltd. v. United States of America*, No. 14 C 10243). The parties filed cross-motions for summary judgment on a set of stipulated facts. Docs. 23, 25. Plaintiffs' motions are denied and the Government's motions are granted.

Background

The parties agree that the court should rely on a jointly submitted set of stipulated facts in deciding the summary judgment motions. Doc. 22 at 2; *see Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 573 (7th Cir. 2014); *Hess v. Hartford Life & Accident Ins. Co.*, 274 F.3d 456, 461 (7th Cir. 2001); *Mkt. Street Assocs. L.P. v. Frey*, 941 F.2d 588, 590 (7th Cir. 1991). Plaintiffs are rail carriers as defined by the RRTA, 26 U.S.C. § 3231(g). Doc. 22 at ¶ 6. Plaintiffs have significant railroad operations in the Midwest and Mississippi Valley, and are indirect wholly owned subsidiaries of Canadian National Railway Company. *Id.* at ¶¶ 8-9.

This case concerns the tax years 2006 through 2013. *Id.* at ¶¶ 3, 22. During that time, pursuant to Canadian National's Management Long-Term Incentive Plan and Illinois Central's Executive Performance Compensation Program, Plaintiffs granted options of Canadian National stock to certain

employees. Id. at ¶¶ 22, 26(a), 29(c). The options were "nonqualified" stock options, meaning that they were not incentive stock options as defined in 26 U.S.C. § 422(b) or part of an employee stock purchase plan as defined in 26 U.S.C. § 423(b), which in turn means that they were not "qualified stock options" as defined in the RRTA, 26 U.S.C. § 3231(e)(12). *Id.* at ¶ 22. Each option gave the employee the right to purchase one share of Canadian National stock at a fixed price equal to the stock's publicly traded price on the date of the option grant ("exercise price"). *Id.* at ¶ 23(a). If an option was not exercised within a ten-year term, or possibly earlier if an employee retired or died, it expired. *Id.* at ¶¶ 23(a), 26(f). (The options of any employee dismissed for cause or who voluntarily left Plaintiffs expired immediately. *Id.* at ¶ 26(f).) Twenty-seven percent of the options exercised from 2006-2013 were "performance" options, exercisable only if Canadian National attained certain financial performance benchmarks in a given year, while the remaining seventy-three percent were exercisable without regard to corporate financial performance or other constraints. *Id.* at ¶ 25.

In lieu of the Social Security taxes paid by non-rail employers and employees under the Federal Insurance Contributions Act ("FICA"), 26 U.S.C. §§ 3101 *et seq.*, railroad employers and employees pay taxes under the RRTA. Doc. 22 at ¶ 7. Unlike FICA, the RRTA imposes two tiers of taxes, with Tier 1 providing benefits and taxes in a manner almost identical to FICA, and Tier II functioning like a private pension plan, tying its benefits to any individual employee's "earnings and career service."

26 U.S.C. § 3201. Tier 1 taxes are statutorily linked to FICA:

> In addition to other taxes, there is hereby imposed on the income of each [rail carrier] employee a tax equal to the applicable percentage of the compensation received during any calendar year by such employee for services rendered by such employee. For purposes of the preceding sentence, the term "applicable percentage" means the percentage equal to the sum of the rates of tax in effect under [FICA].

26 U.S.C. § 3201(a). The RRTA defines "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. § 3231(e)(1). Much as RRTA tax rates are statutorily linked to FICA, Treasury Department regulations define RRTA compensation by reference to FICA, providing that under the RRTA, "[t]he term compensation has the same meaning as the term wages in section 3121(a) [FICA] ... except as specifically limited by the" RRTA. 26 C.F.R. § 31.3231(e)-1. FICA in turn defines "wages" as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash," subject to several inapplicable exceptions. 26 U.S.C. § 3121(a).

The dispositive issue here is whether the non-qualified stock options that Plaintiffs awarded to their employees are a "form of money remuneration" and thus "compensation" under the RRTA. Doc. 22 at ¶ 2.

In their initial tax payments for the years at issue, Plaintiffs treated each exercised option as income for federal income tax purposes and compensation for the purposes of the RRTA, in the amount by which the publicly traded share price of Canadian National on the exercise date exceeded the exercise price for each option exercised. *Id.* at ¶ 23(c). Plaintiffs now believe that was a mistake. Wisconsin Central seeks refunds for the 2007-2011 and 2013 tax years in the amount of $205,327.49, Doc. 1 at ¶ 1; Doc. 22 at ¶ 3; Grand Trunk Western seeks refunds for the 2006-2012 tax years in the amount of $515,589.58, Doc. 22 at ¶ 3; Doc. 1 (14 C 10244) at ¶ 1; and Illinois Central seeks refunds for the 2006-2013 tax years in the amount of $12,600,958.82, Doc. 22 at ¶ 3; Doc. 1 (14 C 10246) at ¶ 1.

Similar suits have been filed in recent years. *See BNSF Ry. Co. v. United States*, 775 F.3d 743 (5th Cir. 2015); *Union Pac. R.R. Co. v. United States*, No. 8:14-cv-00237, slip op. (D. Neb. Jul. 1, 2016) (reproduced at Doc. 35-1); *CSX Corp. v. United States*, No. 3:15-cv-00427 (M.D. Fla. filed Apr. 3, 2015). In the two judgments issued thus far, the Fifth Circuit in *BNSF Railway* and the District of Nebraska in *Union Pacific* both upheld the Treasury Department's interpretation of "any form of money remuneration" to include non-qualified stock options. For the following reasons, this court reaches the same result.

Discussion

The parties agree that this case is governed by the framework set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Doc. 24 at 13; Doc. 26 at 10; Doc. 27 at

7; Doc. 28 at 4. Plaintiffs therefore have forfeited, if not waived, any argument that *Skidmore*, *Auer*, or some other deference regime applies. *See G & S Holdings LLC v. Cont'l Cas. Co.*, 697 F.3d 534, 538 (7th Cir. 2012) ("We have repeatedly held that a party waives an argument by failing to make it before the district court."); *Milligan v. Bd. of Trs. of S. Ill. Univ.*, 686 F.3d 378, 386 (7th Cir. 2012) ("[T]he forfeiture doctrine applies not only to a litigant's failure to raise a general argument ... but also to a litigant's failure to advance a specific point in support of a general argument."); *Costello v. Grundon*, 651 F.3d 614, 635 (7th Cir. 2011) ("As the moving party, the [defendant] had the initial burden of identifying the basis for seeking summary judgment."); *Salas v. Wis. Dep't of Corr.*, 493 F.3d 913, 924 (7th Cir. 2007) ("[A] party forfeits any argument it fails to raise in a brief opposing summary judgment.").

"At *Chevron*'s first step, [the court] determine[s]—using ordinary principles of statutory interpretation—whether Congress has directly spoken to the precise question at issue." *Coyomani-Cielo v. Holder*, 758 F.3d 908, 912 (7th Cir. 2014). If "Congress has directly spoken to the precise question at issue ... the court ... must give effect to the unambiguously expressed intent of Congress," *Indiana v. EPA*, 796 F.3d 803, 811 (7th Cir. 2015) (quoting *Chevron*, 467 U.S. at 842-43) (ellipses original) (internal quotation marks omitted), and end the inquiry there, *see Coyomani-Cielo*, 758 F.3d at 912. "If, however, 'the statute is silent or ambiguous with respect to the specific issue,'" *Chevron*'s second step, at which "a reviewing court must defer to the agency's interpretation if it is reasonable," comes into

play. *Indiana v. EPA*, 796 F.3d at 811 (quoting *Chevron*, 467 U.S. at 843-44). Significantly, "there is a difference—which may be important in some *Chevron* cases—between clear meaning and the best of several interpretive choices." *Coyomani-Cielo*, 758 F.3d at 914. If Congress has not directly spoken to the issue, it "has left the administrative agency with discretion to resolve a statutory ambiguity," and so the court must defer to an agency's reasonable interpretation of the statute. *Ibid.* (internal quotation marks omitted); *see also Indiana v. EPA*, 796 F.3d at 811.

I. *Chevron* Step One

"The cardinal canon of statutory interpretation is that" a court "look[s] first to the text of the statute." *United States v. All Funds on Deposit with R.J. O'Brien & Assocs.*, 783 F.3d 607, 622 (7th Cir. 2015) (quoting *Conn. Nat'l Bank v. German*, 503 U.S. 249, 253 (1992)). "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Turley v. Gaetz*, 625 F.3d 1005, 1008 (7th Cir. 2010) (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)) (internal quotation marks omitted); *see also United States v. Titan Int'l, Inc.*, 811 F.3d 950, 952 (7th Cir. 2016). "In the absence of statutory definitions," the court "accord[s] words and phrases their ordinary and natural meaning and avoid[s] rendering them meaningless, redundant, or superfluous." *CFTC v. Worth Bullion Grp., Inc.*, 717 F.3d 545, 550 (7th Cir. 2013) (internal quotation marks omitted). "Statutory interpretation is guided not just by a single sentence or sentence fragment, but

by the language of the whole law, and its object and policy." *Ibid.* (internal quotation marks omitted). "Indeed, statutory interpretation is a holistic endeavor and, at a minimum, must account for the statute's full text, language as well as punctuation, structure, and subject matter." *Trs. of Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Leaseway Transp. Corp.*, 76 F.3d 824, 828 (7th Cir. 1996); *see also Estate of Moreland v. Dieter*, 576 F.3d 691, 699 (7th Cir 2009).

The RRTA does not define the term "any form of money remuneration." The question here is whether that term is limited to money itself—meaning fiat currency like dollars or pounds, or even virtual currency like Bitcoin—or whether it also includes other items of value and, if so, whether those items include non-qualified stock options.

The Seventh Circuit has held that dictionary definitions are of only limited use in statutory interpretation. *See Suesz v. Med-1 Sols., LLC*, 757 F.3d 636, 643 (7th Cir. 2014) (en banc) ("Dictionaries can be useful in interpreting statutes, but judges and lawyers must take care not to 'overread' what dictionaries tell us.") (citing *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014)) (citation omitted); *United States v. Costello*, 666 F.3d 1040, 1043-44 (7th Cir. 2012) ("[D]ictionaries must be used as sources of statutory meaning only with great caution. ... Dictionary definitions are acontextual, whereas the meaning of sentences depends critically on context."). Still, both parties cite dictionary definitions to support their competing readings of the statute. Plaintiffs cite definitions of "money" as "something generally accepted as a

medium of exchange, a measure of value, or a means of payment," or "a current medium of exchange in the form of coins and banknotes; coins and banknotes collectively," and argue that those definitions clearly exclude property, such as the Canadian National stock options, "without a fixed pecuniary value, whose monetary value fluctuates over time ... and which is not accepted as a medium of exchange or payment." Doc. 24 at 17; *see* "Money," *Merriam-Webster* (2016), https://perma.cc/452T-2GPS; "Money," *Oxford Dictionaries* (2016), https://perma.cc/EZX3-2PJG. The Government responds by citing the *Oxford English Dictionary*, which defines "money" as a "means of payment considered as representing value or purchasing power; ... [h]ence: property, possessions, resources, etc., viewed as having exchangeable value or a value expressible in terms of monetary units," and therefore that money does not "always or only mean 'cash money.'" Doc. 26 at 11 (quoting "Money," *Oxford English Dictionary* (2016), https://perma.cc/Z5TG-2KKF). *Black's Law Dictionary* provides various definitions, narrow and broad, including a "medium of exchange authorized or adopted by a government as part of its currency"; "[a]ssets that can be easily converted to cash"; and "[c]apital that is invested or traded as a commodity." *Black's Law Dictionary* 1096 (9th ed. 2009).

At common law, "money" was defined largely in the negative, as goods and instruments that were by legal fiction not subject to the principle of *nemo dat qui non habet*, Latin for "he who has not cannot give." James Steven Rogers, "Policy Perspectives on Revised U.C.C. Article 8," 43 *UCLA L. Rev.* 1431, 1461-62 (1996). Because applying that principle strictly would

interfere with the smooth functioning of the economy, Lord Mansfield held that once a financial instrument is "treated as money, as cash, in the ordinary course and transactions of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes," it effectively *is* money and is therefore not subject to principles that applied to non-money property, such as repossession by a former owner. *Miller v. Race* (1758) 97 Eng. Rep. 398, 401 (KB); *see also Murray v. Lardner*, 69 U.S. (2 Wall.) 110, 118-19 (1864) (discussing *Miller v. Race*); James Steven Rogers, "The New Old Law of Electronic Money," 58 *SMU L. Rev.* 1253, 1256 (2015) ("*Miller* held that Bank of England notes, which were not at the time formally legal tender, were governed by the same rules as money itself.").

As the Fifth Circuit noted in *BNSF Railway*, these disparate "definitions of 'money' are less than helpful" in determining the meaning of the statutory term "any form of money remuneration." 775 F.3d at 752. Because *Chevron*'s first step directs attention to the "unambiguously expressed intent of Congress," the fact that the word "money" has several reasonable definitions—and that the statute itself provides that "money remuneration" has multiple "form[s]"—strongly suggests that the term "any form of money remuneration" is subject to multiple reasonable interpretations as well. At the very least, dictionary and common law definitions do not on their own provide an unambiguous statutory meaning.

The same holds for the RRTA's structure; indeed, if anything, the statutory structure favors the Government's reading over Plaintiffs'. The "commonsense canon of *noscitur a sociis* ... counsels

that a word is given more precise content by the neighboring words with which it is associated." *Worth*, 717 F.3d at 550 (quoting *United States v. Williams*, 553 U.S. 285, 294 (2008)). Under that canon, "the fact that several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well." *Id.* at 550-51 (internal quotation marks omitted). Statutory language is thus given meaning "with an eye toward 'the company it keeps.'" *Id.* at 551 (quoting *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995)). "While not an inescapable rule, this canon is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *McDonnell v. United States*, 136 S. Ct. ___, 2016 WL 3461561, at *13 (U.S. June 27, 2016) (internal quotation marks omitted).

After defining "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers," § 3231(e)(1) specifically excludes four forms of payment from the meaning of "compensation":

> Such term does not include (i) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their

> dependents), on account of sickness or accident disability or medical or hospitalization expenses in connection with sickness or accident disability or death, except that this clause does not apply to a payment for group-term life insurance to the extent that such payment is includible in the gross income of the employee, (ii) tips (except as is provided under paragraph (3)), (iii) an amount paid specifically—either as an advance, as reimbursement or allowance—for traveling or other bona fide and necessary expenses incurred or reasonably expected to be incurred in the business of the employer provided any such payment is identified by the employer either by a separate payment or by specifically indicating the separate amounts where both wages and expense reimbursement or allowance are combined in a single payment, or (iv) any remuneration which would not (if [FICA] applied to such remuneration) be treated as wages (as defined in section 3121(a)) by reason of section 3121(a)(5).

26 U.S.C. § 3231(e)(1). These exceptions do not apply here, but the fact that Congress felt it necessary to include the first exception—which covers employer-provided health and disability insurance—suggests a relatively broad scope of the term "money remuneration." Congress would have had no need to carve that exception if it did not consider such insurance to otherwise be a "form of money

remuneration." *See United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1400 (2014) (holding that an express "exemption" for severance payments in FICA "would be unnecessary were severance payments in general not within FICA's definition of 'wages.'"). Yet employer-provided insurance is not a medium of exchange or a means of payment, and thus falls outside the narrow definition of "money remuneration" urged by Plaintiffs. "The specificity of th[is] exemption[]" thus "reinforces the broad nature of" the RRTA's definition of "money remuneration." *Ibid.*; *see also Univ. of Chi. v. United States*, 547 F.3d 773, 775 (7th Cir. 2008) (noting that that the FICA term "'wages' ... is broadly defined but followed by specific exceptions").

Section 3231(e)(12) contains an additional exclusion for qualified stock options from the definition of "compensation." *See* 26 U.S.C. § 3231(e)(12). Like health and accident disability insurance, a qualified stock option is neither a medium of exchange nor commonly understood as synonymous with "cash money." It follows that interpreting "any form of money remuneration" to be limited to fiat or virtual currency, as Plaintiffs urge, would improperly render the exclusion of qualified stock options meaningless, redundant, or superfluous." *Worth*, 717 F.3d at 550 (internal quotation marks omitted); *see also In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 710 (7th Cir. 2015) ("The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.") (quoting *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013)) (internal quotation marks omitted); *River Rd. Hotel Partners,*

LLC v. Amalgamated Bank, 651 F.3d 642, 651 (7th Cir. 2011) ("In general, canons of statutory construction urge courts to interpret statutes in ways that make every part of the statute meaningful. Interpretations that result in provisions being superfluous are highly disfavored.") (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)) (citation omitted). Moreover, "where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied in the absence of evidence of a contrary legislative intent." *United States v. France*, 782 F.3d 820, 825 (7th Cir. 2015) (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)), *vacated on other grounds*, 136 S. Ct. 582 (2015). Thus, the explicit exclusion of *qualified* stock options strongly suggests not only that the term "any form of money remuneration" includes stock options in general, but also that only qualified stock options and not *non-qualified* stock options are to be excluded.

Plaintiffs contend that construing "any form of money remuneration" to refer to anything other than cash money would render the term "money" superfluous. Doc. 24 at 15. The Government responds that understanding the term to refer only to cash money would improperly read "any form of" out of the statute, and that the words "any form of" would themselves be unnecessary if "money remuneration" referred only to actual cash. Doc. 26 at 11. Plaintiffs retort that "any form of" refers to different forms by which Plaintiffs may convey money to their employees, including hourly wages, overtime pay, per-mile or piecework pay, weekly or monthly salaries, bonuses, or commissions. Doc. 27 at 11. The court

need not resolve this dispute, because both positions are plausible—providing further support for the notion that the statutory meaning is not clear. *See Coyomani-Cielo*, 758 F.3d at 912-13 (holding that a statute is ambiguous for *Chevron* purposes when "neither [party's] interpretation is obviously required by the statute and both interpretations arguably read words out of the statute").

Considering the RRTA's subject matter likewise does not point decisively in favor of Plaintiffs' interpretation. "[D]ifferent acts which address the same subject matter, which is to say are *in pari materia*, should be read together such that the ambiguities in one may be resolved by reference to the other." *Firstar Bank, N.A. v. Faul*, 253 F.3d 982, 990 (7th Cir. 2001); *see also United States v. Sanders*, 708 F.3d 976, 993 (7th Cir. 2013) (noting that "another 'longstanding' canon of statutory interpretation is 'construing statutes *in pari materia*'") (quoting *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)). Often, the "tricky issue when applying this canon is determining when different statutes should be regarded as addressing the same topic," *Firstar Bank*, 253 F.3d at 990, but the Seventh Circuit has expressly noted that the "Railroad Retirement Tax Act ... is to the railroad industry what the Social Security Act is to other industries: the imposition of an employment or payroll tax on both the employer and the employee, with the proceeds used to pay pensions and other benefits." *Std. Office Bldg. Corp. v. United States*, 819 F.2d 1371, 1373 (7th Cir. 1987); *see also Herzog Transit Servs., Inc. v. U.S. R.R. Ret. Bd.*, 624 F.3d 467, 471 (7th Cir. 2010) ("Employers and employees subject to the [the

railroad] Acts must pay a payroll tax akin to the social security tax requirement of other employers and employees. These taxes [are] established by the Railroad Retirement Tax Act."). Other circuits have reached the same conclusion. *See BNSF Ry.*, 775 F.3d at 749-50, 754 & n.81 (citing *Standard Office Building*, 819 F.2d at 1373, collecting cases, and noting that "it is well-established that the RRTA and FICA are parallel statutes, and courts often look to FICA when interpreting the RRTA"); *N.D. State Univ. v. United States,* 255 F.3d 599, 604 (8th Cir. 2001) (calling the RRTA "the equivalent of FICA for railroad employees"); *Mont. Rail Link, Inc. v. United States,* 76 F.3d 991, 993 (9th Cir. 1996) ("The RRTA serves as the functional equivalent of the Social Security Act for railroad employers."); *Chi. Milwaukee Corp. v. United States*, 40 F.3d 373, 374 (Fed. Cir. 1994) ("RRTA tax is similar to the tax imposed by the Federal Insurance Contributions Act.").

Plaintiffs respond that the "conceptual similarity between the Social Security and Railroad Retirement *systems*, important as it is in many contexts, does not assist in the resolution of the instant case that turns on enforcement of specific statutory language in the RRTA." Doc. 27 at 8-9. But that is precisely the point of the *in pari materia* canon: "statutes addressing the same subject matter *generally* should be read as if they were one law," with the traditional tools of statutory interpretation applied accordingly. *Wachovia Bank v. Schmidt*, 546 U.S. 303, 316 (2006) (emphasis added). Thus, although FICA does not by completely define the RRTA's various contours, examining the former to elucidate related provisions of the latter is an acceptable mode of statutory

interpretation given the close linkages between the statutes.

As noted, FICA defines "wages" as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash," subject to several exceptions. 26 U.S.C. § 3121(a). That is broad language, and the Supreme Court recently reiterated "the term 'wages' in the Social Security statutory context to have substantial breadth." *Quality Stores*, 134 S. Ct. at 1400; *see also Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 48 (2011) (noting that "Congress has defined 'wages' broadly" under FICA). Applying the *in pari materia* canon supports the proposition that just as courts construe FICA "wages" broadly, so, too, should they broadly construe RRTA "compensation."

Plaintiffs contend that because, "taking Tier 1 and Tier 2 taxes together," RRTA tax rates significantly exceed FICA tax rates, "it is completely understandable that Congress would be more comfortable with a more restricted [RRTA] tax base ... to help moderate the higher overall tax." Doc. 27 at 9 n.1. This argument fails for two reasons. First, Congress itself sets the tax rates. If Congress wanted to ensure a roughly equal tax burden for employers and employees in railroad and non-railroad jobs, "there was a much simpler, clearer, and more direct way for Congress to convey" that: by imposing equal tax rates, not by employing ambiguous statutory language that leaves open to reasonable debate the RRTA tax base. *Coyomani-Cielo*, 758 F.3d at 913. Second, given that only RRTA Tier 1 "provides benefits and taxes in a manner almost identical to

FICA," *BNSF Ry.*, 775 F.3d at 750, Plaintiffs' inclusion of the RRTA Tier 2 taxes in their calculation results in a comparison of apples to oranges.

To be clear, the *in pari materia* canon does not establish that the term "any form of money remuneration" *unambiguously* encompasses the non-qualified stock options at issue here. As the Government acknowledges, Doc. 26 at 16, the RRTA and FICA, *in pari materia* or not, are not identical. They do use distinct terms to refer to the funds that provide the basis for their employer and employee taxes, and "the choice of substantially different words to address analogous issues signifies a different approach." *Taracorp, Inc. v. NL Indus., Inc.*, 73 F.3d 738, 744 (7th Cir. 1996). It therefore may be, as Plaintiffs argue, that the different phrasing "is one of the key differences" between the RRTA and FICA and their respective retirement tax systems. Doc. 27 at 7 (emphasis omitted). Yet this also does not provide for *Chevron* purposes an unambiguous meaning of the term. Rather, as with the contrasting dictionary definitions, the very fact that applying different canons, or even the same canon, can support different outcomes refutes the notion that Congress's "unambiguously expressed intent" aligns with Plaintiffs' interpretation of the term. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (holding that a statute did "not itself provide clear guidance" under *Chevron* because reading the statute's words in context dictated a different result than reading them "in light of the canon against implied repeals"); *Coyomani-Cielo*, 758 F.3d at 913 ("In light of the foregoing analysis—which suggests some confusion, potential contradictions,

and a much clearer way to make the point that Congress may have been trying to make—we cannot say that [the statute] is 'clear' at *Chevron*'s first step."); *Arobelidze v. Holder*, 653 F.3d 513, 518-19 (7th Cir. 2011) ("When, as here, there are two plausible but different interpretations of statutory language, there is ambiguity.") (internal quotation marks omitted).

Plaintiffs contend that the absence of a statutory definition for "money" in the RRTA and the Internal Revenue Code ("IRC") implies that the word must have "a commonly understood meaning outside the context of the Internal Revenue Code, and that its common definition and usage should apply throughout the Code, in the absence of any specific modification for a particular provision." Doc. 24 at 15-16. That argument elides the crucial issue. True enough, "[i]n evaluating statutory language, a court ... 'giv[es] the words used their ordinary meaning.'" *Lewis v. Epic Sys. Corp.*, ___ F.3d ___, 2016 WL 3029464, at *2 (7th Cir. May 26, 2016) (quoting *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1165 (2014)) (alteration in original); *see also Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013) ("[U]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.") (internal quotation marks omitted). But as demonstrated above, the "ordinary understanding" of "any form of money remuneration" in the context of the RRTA is elusive. Moreover, although Plaintiffs cite several unrelated IRC provisions that appear to refer to "money" as a type of property, Doc. 24 at 16, 22; Doc. 27 at 12-13, the IRC definitional section, 26 U.S.C. § 7701, does not define the term, and nor does the IRC elsewhere refer to "money remuneration." Doc. 28 at

7. More important, none of the IRC provisions cited by Plaintiffs define the boundaries of the money subtype of property, and so regardless of whether those provisions could be useful in interpreting the RRTA, they do not provide a clear definition for "any form of money remuneration." *See* 26 U.S.C. §§ 118(c) ("money or other property"), 317(a) ("property" includes "money, securities, and any other property"), 461(f) ("money or other property"), 465(b)(1)(A) ("the amount of money and the adjusted basis of other property contributed by the taxpayer to the activity"), 1038(b) ("money and the fair market value of other property").

Plaintiffs also argue that the "common understanding" of money is that it "has a constant amount or denomination representing a specific stored value that can be applied to a future transaction." Doc. 24 at 16. They contrast this with non-money property, which "has no fixed value but is susceptible to varying valuations over time and subjectively in the hands of different holders." *Ibid.* That distinction lacks a statutory basis, as shown above, and it also fails as a matter of internal logic. Money, even assuming it is limited to fiat currency, is itself subject to varying valuations over time, through cycles of inflation or deflation or its fluctuation relative to foreign currencies. Monetary transactions are by their nature bilateral. For example, when a table—or a stock option—experiences a change in value, money does as well: if a formerly $100 table now costs $200, then $200, which was formerly valued at two tables, is now valued at one.

Or consider that, at the close of business on June 23, 2016, one British pound was worth $1.49, while

the following day, after the Brexit vote, one pound was worth $1.37. *See* "Historical Rates for the GBP/USD Currency Conversion on 23 June 2016," *PoundSterling Live* (2016), https://perma.cc/ED2R-LAER; "Historical Rates for the GBP/USD Currency Conversion on 24 June 2016," *PoundSterling Live* (2016), https://perma.cc/K478-3PKU. In other words, on June 23, one dollar was valued at £0.67; the following day, it was valued at £0.73. The dollar's "specific stored value" had changed in all ways other than the number printed the banknote or coin—which is to say, it had changed in all ways meaningful to the bearer, or to the employee receiving it as compensation. This is at the very least similar to the value of a stock option: it may fluctuate in value prior to exercise, but at the time of exercise it has a fixed monetary value, which provides the base on which Plaintiffs allegedly overpaid RRTA taxes.

To that point, it bears noting that railroads around the country, including Plaintiffs, until recently held the view that the non-qualified stock options *were* "money remuneration" under the RRTA and accordingly paid RRTA tax on them. Doc. 22 at ¶ 23(c); *BNSF Railway*, 775 F.3d at 746-47; Complaint at ¶¶ 2, 24, *CSX Corp.*, No. 3:15-cv-00427 (M.D. Fla.); Complaint at ¶¶ 2, 17, *Union Pac. R.R. Co.*, No. 8:14-cv-00237 (D. Neb.). The fact that highly interested parties with undoubtedly sophisticated tax counsel held this view against their own interests confirms, though no further confirmation is necessary, that, at a minimum, the statute is ambiguous.

Finally, Plaintiffs contend that the history of the Economic Growth Act of 1992, S. 2217 102d Cong. (1992), an ultimately unadopted amendment to the

RRTA, provides support for their position that "any form of money remuneration" refers unambiguously to cash money. Doc. 27 at 10. In the Seventh Circuit, however, legislative history is not considered until the second step of the *Chevron* analysis. *See Coyomani-Cielo*, 758 F.3d at 914 ("[W]e realize that some of our sister circuits consider legislative history at [*Chevron* step one], but we prefer to save that inquiry for *Chevron*'s second step.") (citation omitted); *Emergency Servs. Billing Corp., Inc. v. Allstate Ins. Co.*, 668 F.3d 459, 465 (7th Cir. 2012) ("In this Circuit, we seem to lean toward reserving consideration of legislative history and other appropriate factors until the second *Chevron* step.") (internal quotation marks omitted).

To summarize, the meaning of "any form of money remuneration" in 26 U.S.C. § 3231(e)(1) is not clear and unambiguous under *Chevron*.

II. *Chevron* Step Two

"At the second stage of the *Chevron* analysis, [the court] determine[s] whether the agency's interpretation is reasonable." *Coyomani-Cielo*, 758 F.3d at 914. The court's "review at this stage is deferential; [the court] will uphold the agency's interpretation so long as it is 'a permissible construction of the statute.'" *Ibid.* (quoting *Chevron*, 467 U.S. at 843). "If that [agency] interpretation is reasonable, it must be followed, regardless of whether or not the reviewing court would have come to the same conclusion." *Emergency Servs. Billing*, 668 F.3d at 466 (citing *Chevron*, 467 U.S. at 843 n.11).

The Treasury Department has the "general authority under 26 U.S.C. § 7805(a) to 'prescribe all needful rules and regulations for the enforcement' of

the Internal Revenue Code." *Mayo Found.*, 562 U.S. at 56. Treasury Regulation § 31.3231(e)-(1) provides that under the RRTA, "[t]he term compensation has the same meaning as the term *wages* in section 3121(a) [FICA] ... except as specifically limited by the" RRTA. 26 C.F.R. § 31.3231(e)-1. As noted, § 3121 defines "wages" as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." 26 U.S.C. § 3121(a). The Treasury's interpretation of the statute is reasonable. As discussed at length above, the term "any form of money remuneration" in the RRTA is susceptible to a broad reading analogous to that of "wages" in FICA. The structure of the RRTA, particularly the specific exclusions in 26 U.S.C. § 3231(e)(1) & (12), supports (but does not necessarily compel) a broad interpretation, as does the close relationship of the RRTA with FICA. And recent Supreme Court decisions emphasize and reaffirm the broad reading of FICA's definition of "wages." *See Quality Stores*, 134 S. Ct. at 1399-1400; *Mayo Found.*, 562 U.S. at 48.

Common sense also supports the reasonableness of Treasury's interpretation. Stock options are financial instruments. Unlike a car or home, they have very little, if any, intrinsic value to their holders beyond their monetary value. They are readily and regularly convertible into cash, distinguishing them from most non-money property. Although Plaintiffs accurately note that "[a]ny property, cash or non-cash, has a monetary value that can be estimated at any given point," Doc. 27 at 14 n.5, stock options, unlike many forms of non-money property, exist almost exclusively to be converted into cash. Further, the fact that

reading "any form of money remuneration" to include non-qualified stock options eliminates the possibility that railroads could structure their compensation packages in such a way as to substantially reduce their RRTA tax burden provides further justification for finding that Treasury's interpretation is reasonable and permissible.

The legislative history cited by Plaintiffs does not render Treasury's reading unreasonable. The Economic Growth Act of 1992 was a bill that proposed to "conform the definition of compensation under the Railroad Retirement Act to that under the Federal Insurance Contributions Act." S. 2217 102d Cong. tit. XLI (1992). The bill did not progress beyond the Finance Committee and was not subject to a vote. *See* "S.2217 – Economic Growth Act of 1992," *Congress.gov* (2016), https://perma.cc/ZG2K-ZFVK. Plaintiffs contend that the bill's failure indicates that Congress "did not intend for the RRTA to be interpreted coextensively with FICA" and that if the Government's "interpretation of the RRTA were correct, this proposed amendment would have been unnecessary." Doc. 27 at 10.

As the Government correctly observes, however, "congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *United States v. Craft*, 535 U.S. 274, 287 (2002) (internal quotation marks omitted); *see also Lawson*, 134 S. Ct. at 1173 n.16 ("Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute.") (internal quotation marks omitted).

Further, "[t]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Paramount Health Sys., Inc. v. Wright*, 138 F.3d 706, 710 (7th Cir. 1998) (quoting *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 348-49 (1963)). The Economic Growth Act of 1992 was proposed fifty-seven years after the term "any form of money remuneration" was first incorporated into RRTA. *See* 49 Stat. 974 § 1(d) (1935); *BNSF Ry.*, 775 F.3d at 755 & nn. 88-91 (reviewing the RRTA's legislative history). Its mere existence as an unenacted legislative proposal is certainly not enough to overcome the deference owed to Treasury's interpretation of the RRTA.

Plaintiffs retort that even if Treasury's interpretation of the RRTA is reasonable, the particular non-qualified stock options at issue here are not compensation under the RRTA because the phrase "money remuneration" is a "specific limit[ation]" in the RRTA that distinguishes RRTA compensation from FICA wages, 26 C.F.R. § 31.3231(e)-1. Doc. 24 at 18-20; Doc. 27 at 14-17. But Treasury does not interpret that phrase as a specific limitation, and its interpretation is reasonable. As discussed above, 26 U.S.C. § 3231 contains several enumerated exclusions, including one for qualified stock options, § 3231(e)(12). Plaintiffs protest that this "'rifle shot' option exclusion[]" was "designed to resolve specific treatment of those types of options, not others." Doc. 27 at 16 & n.6. That may be right as a historical matter, but it does not follow that Treasury's interpretation is unreasonable, and Plaintiffs err in seeking comfort from the Supreme Court's observation that "the statement that all men

shall be treated as if they were six feet tall does not imply that no men are six feet tall." *Id.* at 16 (quoting *Quality Stores*, 134 S. Ct. at 1402). A more appropriate analogy would be a statute that explicitly excludes men who were six feet tall; an agency interpretation that the statute did not exclude men who were 6'1" would be reasonable.

Plaintiffs make two additional arguments. First, they contend that the Government's position that non-qualified stock options are "money remuneration" is an impermissible "post hoc rationalization" that the IRS had never offered until this case and others like it were filed. Doc. 24 at 19. But that interpretation certainly cannot be a post-hoc rationalization when the need to apply it had not presented itself before, in large part because Plaintiffs and other railroads themselves believed that the stock options fell within the RRTA's compensation provision and paid taxes in accordance with that belief.

Second, Plaintiffs and the Government dispute the relevance of IRS Revenue Ruling 69-391, 1969-2 C.B. 191, which held that railroad-furnished housing for certain foremen that had a fixed value was taxable compensation under the RRTA. While Plaintiffs' reliance on this ruling has several weaknesses, including that it does not deal with stock options and was issued by the IRS rather than the Treasury Department, the biggest problem is that, under Seventh Circuit precedent, IRS revenue rulings are "entitled to respectful consideration, but not to the deference that the *Chevron* doctrine requires in its domain." *First Chi. NBD Corp. v. Comm'r*, 135 F.3d 457, 459 (7th Cir. 1998) (citations omitted); *see also Wetzler v. Ill. CPA Soc'y & Found. Ret. Inc. Plan*, 586

F.3d 1053, 1058 (7th Cir. 2009) ("Revenue rulings are not binding on this Court and we give them the lowest degree of deference[,] which equates to some deference or respectful consideration.") (internal quotation marks omitted). By contrast, Treasury's interpretation "is given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation'" or statute. *United States ex rel. Garbe v. Kmart Corp.*, __ F.3d ___, 2016 WL 3031099, at *9 (7th Cir. May 27, 2016) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)). Treasury's interpretation is not plainly erroneous or inconsistent with the regulation, and so it controls here.

Conclusion

Plaintiffs' summary judgment motions are denied, and the Government's motions are granted. Judgment in these consolidated cases will be entered in favor of the Government and against Plaintiffs.

July 8, 2016

/s/ Gary Feinerman
United States District Judge

APPENDIX D

26 U.S.C. § 3231(e)

(e) Compensation

For purposes of this chapter—

(1) The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers. Such term does not include (i) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of sickness or accident disability or medical or hospitalization expenses in connection with sickness or accident disability or death, except that this clause does not apply to a payment for group-term life insurance to the extent that such payment is includible in the gross income of the employee, (ii) tips (except as is provided under paragraph (3)), (iii) an amount paid specifically—either as an advance, as reimbursement or allowance—for traveling or other bona fide and necessary expenses incurred or reasonably expected to be incurred in the business of the employer provided any such payment is identified by the employer either by a separate payment or by

specifically indicating the separate amounts where both wages and expense reimbursement or allowance are combined in a single payment, or (iv) any remuneration which would not (if chapter 21 applied to such remuneration) be treated as wages (as defined in section 3121(a)) by reason of section 3121(a)(5). Such term does not include remuneration for service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act, as amended, and which is performed to carry out the purpose specified in subparagraph (F), (J), (M), or (Q), as the case may be. For the purpose of determining the amount of taxes under sections 3201 and 3221, compensation earned in the service of a local lodge or division of a railway-labor-organization employer shall be disregarded with respect to any calendar month if the amount thereof is less than $25. Compensation for service as a delegate to a national or international convention of a railway labor organization defined as an "employer" in subsection (a) of this section shall be disregarded for purposes of determining the amount of taxes due pursuant to this chapter if the individual rendering such service has not previously rendered service, other than as such a delegate, which may be included in his "years of service" for purposes of the Railroad Retirement Act. Nothing in the regulations prescribed for purposes of chapter 24 (relating to wage withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "compensation" in regulations prescribed for purposes of this chapter.

(2) Application of contribution bases

(A) Compensation in excess of applicable base excluded

(i) In general

The term "compensation" does not include that part of remuneration paid during any calendar year to an individual by an employer after remuneration equal to the applicable base has been paid during such calendar year to such individual by such employer for services rendered as an employee to such employer.

(ii) Remuneration not treated as compensation excluded

There shall not be taken into account under clause (i) remuneration which (without regard to clause (i)) is not treated as compensation under this subsection.

(iii) Hospital insurance taxes

Clause (i) shall not apply to—

(I) so much of the rate applicable under section 3201(a) or 3221(a) as does not exceed the rate of tax in effect under section 3101(b), and

(II) so much of the rate applicable under section 3211(a) as does not exceed the rate of tax in effect under section 1401(b).

(B) Applicable base

(i) Tier 1 taxes

Except as provided in clause (ii), the term "applicable base" means for any calendar year the contribution and benefit base determined under

section 230 of the Social Security Act for such calendar year.

(ii) Tier 2 taxes, etc.

For purposes of—

(I) the taxes imposed by sections 3201(b), 3211(b), and 3221(b), and

(II) computing average monthly compensation under section 3(j) of the Railroad Retirement Act of 1974 (except with respect to annuity amounts determined under subsection (a) or (f)(3) of section 3 of such Act), clause (2) of the first sentence, and the second sentence, of subsection (c) of section 230 of the Social Security Act shall be disregarded.

(C) Successor employers

For purposes of this paragraph, the second sentence of section 3121(a)(1) (relating to successor employers) shall apply, except that—

(i) the term "services" shall be substituted for "employment" each place it appears,

(ii) the term "compensation" shall be substituted for "remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection)" each place it appears, and

(iii) the terms "employer", "services", and "compensation" shall have the meanings given such terms by this section.

(3) Solely for purposes of the taxes imposed by section 3201 and other provisions of this chapter insofar as

they relate to such taxes, the term "compensation" also includes cash tips received by an employee in any calendar month in the course of his employment by an employer unless the amount of such cash tips is less than $20.

(4)

(A) For purposes of applying sections 3201(a), 3211(a), and 3221(a), in the case of payments made to an employee or any of his dependents on account of sickness or accident disability, clause (i) of the second sentence of paragraph (1) shall exclude from the term "compensation" only—

(i) payments which are received under a workmen's compensation law, and

(ii) benefits received under the Railroad Retirement Act of 1974.

(B) Notwithstanding any other provision of law, for purposes of the sections specified in subparagraph (A), the term "compensation" shall include benefits paid under section 2(a) of the Railroad Unemployment Insurance Act for days of sickness, except to the extent that such sickness (as determined in accordance with standards prescribed by the Railroad Retirement Board) is the result of on-the-job injury.

(C) Under regulations prescribed by the Secretary, subparagraphs (A) and (B) shall not apply to payments made after the expiration of a 6-month period comparable to the 6-month period described in section 3121(a)(4).

(D) Except as otherwise provided in regulations prescribed by the Secretary, any third party which makes a payment included in compensation solely by

reason of subparagraph (A) or (B) shall be treated for purposes of this chapter as the employer with respect to such compensation.

(5) The term "compensation" shall not include any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 108(f)(4), 117, or 132.

(6) The term "compensation" shall not include any payment made, or benefit furnished, to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127.

[**(7)** Repealed. Pub. L. 113-295, div. A, title II, § 221(a)(19)(B)(v), Dec. 19, 2014, 128 Stat. 4040.]

(8) Treatment of certain deferred compensation and salary reduction arrangements

(A) Certain employer contributions treated as compensation

Nothing in any paragraph of this subsection (other than paragraph (2)) shall exclude from the term "compensation" any amount described in subparagraph (A) or (B) of section 3121(v)(1).

(B) Treatment of certain nonqualified deferred compensation

The rules of section 3121(v)(2) which apply for purposes of chapter 21 shall also apply for purposes of this chapter.

(9) Meals and lodging

The term "compensation" shall not include the value of meals or lodging furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119.

(10) Archer MSA contributions

The term "compensation" shall not include any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(b).

(11) Health savings account contributions

The term "compensation" shall not include any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(d).

(12) Qualified stock options

The term "compensation" shall not include any remuneration on account of—

(A) a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b)), or

(B) any disposition by the individual of such stock.

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IN THE

Supreme Court of the United States

WISCONSIN CENTRAL, LTD.;
GRAND TRUNK WESTERN RAILROAD COMPANY; AND
ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads, many smaller freight railroads, Amtrak, and some commuter authorities.[1] AAR's members operate approximately 83 percent of the rail industry's line haul mileage, produce 97 percent of its freight revenues, and employ 95 percent of rail employees. In matters of industry-wide significance, AAR frequently appears on behalf of the railroad industry before Congress, administrative agencies, and the courts.

This case, which raises the question whether stock received by railroad employees is subject to payroll taxes levied under the Railroad Retirement Tax Act (RRTA), 26 U.S.C. §§3201-3241, presents such a matter of industry-wide significance. Taxes represent the third largest expense for railroads, surpassed only by wages and fuel. In 2016, the railroad industry paid approximately $12 billion in taxes, which included nearly $2.5 billion in payroll taxes. Ass'n. of Am. R.R., *Railroad Facts* 16 (2017 ed.). AAR routinely represents the railroad industry in tax-related matters before the courts and regulatory bodies, such as the Internal Revenue Service and the Railroad Retirement Board. AAR has filed *amicus* briefs with appellate courts and this Court in a number of important tax cases affecting

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[1] As required by Rule 37.2(a), counsel for *amicus curiae* AAR has timely notified the parties of AAR's intent to file this brief. Both parties have consented to AAR's filing of an *amicus* brief. Pursuant to Rule 37.6, AAR states that no person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

the railroad industry (*e.g.*, *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 562 U.S. 277 (2011); *BNSF Ry. Co. v. United States*,745 F.3d 774 (5th Cir. 2014) (in support of petition for rehearing)).

Here, the Court of Appeals issued an expansive interpretation of the term "compensation" under the RRTA which cannot be squared with the text, purpose, or history of the Act. The Court held that almost anything with market value is a "form of money remuneration," and thus subject to payroll tax. Not only does this decision impose a significant tax on non-money remuneration that Congress plainly did not intend to tax, it is in direct conflict with a decision of another court of appeals on the same issue. The conflict created by these decisions means that railroads, and their employees, in different parts of the country are subject to different rules with regard to their obligations to pay taxes under the RRTA. That different tax treatment will continue until this Court resolves the conflict.

Thus, the question presented by this case has implications not just for Petitioners, the U.S. subsidiaries of Canadian National Railway Company, and their employees. It impacts all railroads in the United States that offer, have offered, or are contemplating offering, stock to some of their employees. Therefore, all of AAR's members have a direct and significant interest in having this conflict resolved so they will have clear and uniform guidance regarding their tax obligations.

SUMMARY OF THE ARGUMENT

The petition should be granted so this Court can resolve a split among federal courts of appeals over the question whether stock payments to employees constitute "compensation" under the RRTA. This split creates an untenable situation for the nation's railroads because it results in different tax treatment of different railroads (and their employees) that are located in different parts of the country. Until the circuit split is resolved, railroads will be subject to different rules that will make the tax cost of providing employees with stock—a valuable tool used by many railroads to reward and incentivize employees—greater for some railroads than it is for others. This tax cost variation also will apply to railroad employees—thousands of whom typically are eligible for these programs annually—who, like their employers, also must pay payroll taxes on the compensation they receive.

The courts of appeals' decisions reflect different interpretations of the same statutory language. The Internal Revenue Service interprets the term "compensation" in the RRTA the same way it interprets the term "wages" used in the Federal Insurance Contributions Act—the statute that funds Social Security benefits. However, these two statutes are worded differently; compensation in the RRTA is defined as "any form of money remuneration" while wages in FICA are defined as "all remuneration." The Fifth Circuit found the RRTA ambiguous and deferred to the IRS's interpretation. The Seventh and Eighth Circuits found the RRTA clear and declined to defer to the agency's interpretation—while coming to different conclusions about its meaning. The divergent rationales utilized by the three courts of appeals highlight the need for this Court's review of the question presented.

Creation of the railroad retirement system in the 1930s was neither the first, nor last, time Congress enacted railroad-specific legislation to address particular circumstances or characteristics of the railroad industry. Among other things, the railroad retirement system was designed to address a pension crisis facing the railroads. In doing so, Congress clearly made the choice to define the terms "compensation" and "wages" differently, using narrower language in the RRTA that conformed to the way railroad pensions were calculated at the time, and demonstrates an intent not to tax all forms of remuneration that a railroad employer could confer on an employee. This case provides an excellent opportunity for this Court to provide guidance on statutory construction, and in particular the need to give primacy to the specific words Congress chose to use in a railroad statute aimed at addressing an industry-specific situation.

ARGUMENT

1. The Conflict in the Courts of Appeals Creates Uncertainty and Leaves Railroads and Their Employees in Different Parts of the Country Subject to Different Rules Related to the Taxability of Stock Under the Railroad Retirement Tax Act.

This case involves the interpretation of a federal tax statute that applies to all railroads nationwide. Over the past few years, the statute has been interpreted differently by three federal courts of appeals. The Seventh Circuit has joined the Fifth in interpreting the RRTA to require the payment of millions of dollars in taxes by railroads and their employees when stock is received as remuneration by employees. In contrast, the Eighth Circuit has held that such tax payments are not required. The difference turns on the courts'

interpretations of the term "money remuneration" used in the definition of "compensation" under the RRTA. The split among the circuits means that some railroads (and their employees) must pay taxes on their employees' stock remuneration, while other railroads (and their employees) do not have to pay such taxes on the very same form of remuneration.

While money remuneration in the form of salaries and bonuses constitutes the core of a railroad employee's total compensation, other tools are used by railroad employers to reward and incentivize employees. One such tool is stock, which may be transferred to employees via nonqualified stock options (such as those involved in this case) and restricted stock (such as is involved in other cases, *e.g.*, *Union Pac. R.R. v. United States,* 865 F.3d 1045 (8th Cir. 2017)). Remuneration of this nature is deemed valuable as it gives employees a direct stake in the company's fortunes. Indeed, Congress has sought to encourage employee ownership of employer stock, which is seen as a "device for expanding the national capital base among employees—an effective merger of the roles of capitalist and worker." *Donavan v. Cunningham*, 716 F.2d 1455, 1458 (5th Cir. 1983). *See* Pet. at 8 for an explanation of the stock option program used by Canadian National's U.S. subsidiaries.

All the large railroads utilize or have utilized stock options similar to Canadian National's program at issue in this case. Significantly, the split among the circuits means the tax cost of providing stock to employees will be greater for some railroads than it will be for others, with the different tax treatment depending solely on where the company's headquarters is located.

This is an untenable situation for the nation's railroads. The railroad industry spans the entire nation. Each of the five largest railroads is headquartered in a different federal circuit, three in which the court of appeals has issued rulings on the question presented. Other large railroads are headquartered in circuits that have not ruled on this issue. However, a district court recently issued a decision on this issue which is now on appeal before the Court of Appeals for the Eleventh Circuit, where the headquarters of another major railroad is located. *CSX Corp. v. United States*, No. 3:15-cv-427 (M.D. Fla. May 2, 2017), *appeal docketed*, No. 17-12961 (11th Cir. June 30, 2017). If this Court does not resolve the issue and that appeal goes forward, regardless of how the Eleventh Circuit rules, a split among the circuits will remain.

The divergent decisions affect railroad employees as well as employers. Overall, railroads employ over 200,000 people in the United States, who are spread among all fifty states—from over twenty thousand in both Texas and Illinois to nine in Hawaii. *Railroad Facts* at 58. In recent years stock remuneration has involved several thousand employees and tens of millions of dollars in tax payments. As a result, some railroad employees are covered by one rule, others by a different rule, and for some, the law is unsettled. As with their employers, employees who work for some railroads will bear a larger tax burden when receiving stock than would similarly situated employees of other railroads.

As the petition points out, for Canadian National's subsidiaries—which together are considerably smaller than the four largest freight railroads in the United States—approximately $13 million in potential tax liability is implicated. Pet. at 20. On a national basis, this issue involves many tens of millions of dollars in

potential tax liability. As long as this issue remains unresolved, the nation's railroads will continue to be subject to divergent—indeed, opposite—rules related to these taxes. This lack of uniformity in the law, and the inequities among taxpayers it leads to, can only be eliminated by this Court.

The RRTA funds retirement and disability benefits that are available to railroad workers, their spouses and survivors, under the Railroad Retirement Act (RRA). 45 U.S.C. §§231–231v. To fund these benefits, the RRTA levies payroll taxes on the compensation paid by employers and received by employees. 26 U.S.C. §3221(a) & (b); 26 U.S.C. §3201(a) & (b). Not only have the courts of appeals reached different results about the taxability of stock under the RRTA, they have utilized different methods to interpret the plain language of the statute, and come to different conclusions about whether deference should be given to the administrative agency charged with enforcing the statute.

The Internal Revenue Service's regulation equates the term "compensation" used in the RRTA with the term "wages" used in the Federal Insurance Contributions Act (FICA), 26 U.S.C. §§3101 *et seq.*—the statute that funds Social Security benefits. FICA levies payroll taxes on "wages" which is defined as "*all remuneration* for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." 26 U.S.C. §3121(a). (emphasis supplied) In contrast, the RRTA defines compensation as "any form of *money remuneration* paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. § 3231(e)(1) (emphasis supplied). Despite the very different language used in the statutes, the IRS has

concluded that in the RRTA "[t]he term compensation has the same meaning as the term wages in section 3121(a) [FICA] . . . except as specifically limited by the" RRTA. 26 C.F.R. §31.3231(e)-1.

The lower courts have taken different approaches to the IRS's interpretation. The Fifth Circuit found the statute ambiguous and, under *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984), deferred to the agency's interpretation. *See BNSF Ry. Co. v. United States*, 775 F.3d 743, 755-56 (5th Cir. 2015).[2] The Seventh and Eighth Circuits found the statute clear and refused to defer to the agency's interpretation. Yet, while the Eighth Circuit held that stocks are not money remuneration, *see Union Pac.*, 865 F.3d at 1053, the Seventh Circuit in the decision below ruled for the IRS. Pet App. 1a–13a. The divergent rationales utilized by the three courts of appeals highlight the need for this Court's review of the question presented.

2. The Decision Below is at Odds With This Court's Repeated Rulings That Where Congress Treats Railroads Differently From Other Industries Courts Must Give Effect to Those Differences.

This case offers an opportunity for this Court to provide guidance on the construction of an important federal statute that is unique to the railroad industry. In response to the railroad industry's emergence as the dominant form of interstate commerce in the nineteenth century, and the industry's many unique characteristics, Congress has, on more than one occasion, enacted laws specifically aimed at railroads.

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[2] The district court in Florida also deferred to the IRS's broad interpretation of money remuneration, a ruling now on appeal. *CSX Corp.*

See R.R. Ret. Bd., *Railroad Retirement Handbook* 1 (2015) (available at https://www.rrb.gov/Sites/default/files/2017-04/RRB%20Handbook%20%282015%29.pdf.) (Prior to enactment of the RRA "[n]umerous laws pertaining to rail operations and safety had already been enacted" and "[s]ince passage of the [RRA], numerous other railroad laws have subsequently been enacted."). Congress also has enacted parallel statutes addressing the same subject matters in other industries, retirement security being but one example. Often, Congress has utilized different language in the railroad statutes because, as the result of deliberate policy choices, it intended to treat railroads differently from other industries. In fact, in the context of the Railway Labor Act and the National Labor Relations Act—statutes addressing labor relations in the railroad (and airline) industry and industry in general, respectively—this Court has admonished that "parallels . . . should be drawn with utmost care and with full awareness of the differences between the statutory schemes." *Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 578, n.11 (1971). Rather than heed that admonition, the lower court failed to give primacy to the words Congress chose to use in a railroad-specific statute, and instead interpreted it on the assumption that different words in different statutes mean the same thing. *See Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 62-63 (2006) (The use of different words, especially in similar statutes, is strong evidence that "Congress intended its different words to make a legal difference."). That approach to the RRTA is in direct conflict with this Court's instructions about how to approach railroad-specific statutes generally.

The railroad retirement system and Social Security system are similar in many respects, however, as a

result of deliberate choices made by Congress they differ significantly in others. The RRA provides two tiers of benefits, the first being essentially equivalent to those available to Social Security beneficiaries, but subject to railroad retirement age and service eligibility criteria, which in some circumstances are more generous.[3] Additionally, the RRA provides a second tier of benefits, based entirely on an employee's railroad earnings, which are not available to Social Security beneficiaries. For example, the RRA offers an occupational disability benefit to employees who are disabled from performing their regular occupation, a benefit that is not available to Social Security beneficiaries. 45 U.S.C. §231a(a)(1)(iv). The tier II benefits are supported by payroll taxes on railroads and their employees that are not levied on Social Security employers and employees.

As discussed above, another difference is the language used to define "compensation" (in the RRTA) and "wages" (in FICA). As the petition points out, these very different definitions were enacted in 1935 by the same Congress. *See* Pet. at 6. That same Congress chose to define wages under FICA far more broadly—and specifically to cover nonmonetary payments—than it defined compensation under RRTA. *Compare* 49 Stat. 620, 639 (1935) *with* 49 Stat. 968, 974 (1935) (and in the ensuing 80 years neither definition has been altered). And Congress had good reason to do so.

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[3] For example, railroad employees who have at least thirty years of creditable service can retire with a full pension benefit when they reach age sixty, 45 U.S.C. §231a (a)(1)(ii), while workers covered by the Social Security system are not eligible for an unreduced benefit until between the ages of 66 and 67. 42 U.S.C. §416(l).

As the petition explains, while the Railroad Retirement system and the Social Security system both emerged during the great depression of the 1930s, the circumstances they addressed differed. Pet. at 4. Unlike other industries, many railroads already offered pensions to their employees—the first originating in 1874—although the adequacy and financial stability of some were precarious, a situation that was exacerbated by the economic conditions during the 1930s. *Railroad Retirement Handbook,* at 1. Because the then-proposed Social Security system would not begin paying benefits immediately, and would provide no credit for service prior to 1937, it did not serve the needs of the many railroad pensioners and long-term employees who would have been left without benefits. Therefore, to address that crisis, the RRA created a new federalized railroad pension by mandating benefits financed by taxes. *Railroad Retirement Handbook,* at 1-2; *see Hisquierdo v. Hisquierdo*, 439 U.S. 572, 573-74 (1979).

A federal pension had never been established before, especially one designed to replace private pensions. During an era when *Lochner* jurisprudence still prevailed, Congress anticipated constitutional challenges and a Supreme Court that was skeptical of New Deal legislation. Indeed, the first railroad retirement act was challenged in court and held to be unconstitutional. *R.R. Ret. Bd. v. Alton R.R.*, 295 U.S. 330 (1935).[4] Nonetheless, the quest to strengthen the retirement income security of railroad workers persisted. Ultimately, negotiations between rail labor and management, urged by President Roosevelt, produced

[4] A new railroad retirement law was enacted in 1935. However, this laws too was held unconstitutional in part by a district court. *Alton R.R. v. R.R. Ret. Bd.*, 16 F.Supp. 955 (D.D.C. 1936).

a compromise enacted into law as the Railroad Retirement Act of 1937 and the Carrier Taxing Act of 1937. *Railroad Retirement Handbook*, at 2. To maximize the chances that these statutes would survive judicial review, Congress drafted them, as much as possible, to conform to the railroads' then-current private pensions.

These circumstances provide a logical explanation for the different language Congress used when drafting the railroad retirement statute and Social Security statute. Before enactment of the RRTA, railroad pension plans were typically funded based on an employee's base pay, base salary, or regular pay—*i.e.*, based on each employee's *money* remuneration. Railroad employees often received non-money benefits as well, such as food, lodging, and transportation, but the value of those benefits was not used to compute retirement pensions. MURRAY LATIMER, INDUS. PENSION SYSTEMS IN THE UNITED STATES AND CANADA 20-21, 30-31, 106-108 (1933 ed.). Additionally, many railroads offered employees stock-purchase plans, not dissimilar to the plans at issue here. Nat'l Indus. Conference Bd., *Studies in Industrial Relations: Employee Stock Purchase Plans* 18-22 (1928 ed.). These too were not included in the calculation of employee pension benefits. *See BNSF Ry.*, 775 F.3d at 755 ("[A]t the time the RRTA was enacted existing railroad pension plans were based on an employee's cash compensation only, rather than other, broader types of compensation, despite the fact that some railroad companies apparently offered stock-option benefits.") Thus, in devising a program to replace the ailing private railroad pension system, Congress utilized a similar funding method, under which benefits were calculated based only on monetary remuneration.

Congress clearly made the choice to define the terms "compensation" and "wages" differently, using narrower language in the RRTA that demonstrates an intent not to tax all forms of remuneration that a railroad employer could confer on an employee. Instead, as evidenced by the plain language used, Congress chose to limit such taxation to "any form of money remuneration." In reading the term "money remuneration" broadly—beyond, by its own admission, what was considered to be money at the time—the court below noted that doing so made "good practical sense" because it created proper incentives for the structuring of compensation packages. Pet. App. at 5a. Even if the court's point has some merit as a matter of policy, that is not a judgment that should play a role in a court's interpretation of statutory language when that language is clear.

CONCLUSION

For the foregoing reasons the petition should be granted.

Respectfully submitted,

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November 9, 2017

No. 17-530

IN THE

Supreme Court of the United States

WISCONSIN CENTRAL LTD.; GRAND TRUNK WESTERN RAILROAD COMPANY; AND ILLINOIS CENTRAL RAILROAD COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

JOINT APPENDIX

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CERTIORARI GRANTED JAN. 12, 2018

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Stipulations of Fact (October 27, 2015) JA34

General Docket
Seventh Circuit Court of Appeals

Court of Appeals Docket #: 16-3300	
Docketed:	08/29/2016
Nature of Suit:	2870 Tax Suits
Termed:	05/08/2017
Wisconsin Central Limited v. USA	
Appeal From:	Northern District of Illinois, Eastern Division
Fee Status: Paid	
Case Type Information:	
1) civil	
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Originating Court Information:	
District:	0752-1 : 1:14-cv-10243
Trial Judge:	Gary Feinerman, District Court Judge
Date Filed:	12/22/2014
Date Order/ Judgment:	07/08/2016
Date NOA Filed:	08/29/2016
Prior Cases:	
None	
Current Cases:	
Consolidated	
Lead:	16-3300
	16-3300
Member	16-3303
	16-3304
Start	08/31/2016
	08/31/2016
End	

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WISCONSIN CENTRAL LIMITED,
Plaintiff - Appellant

v.

UNITED STATES OF AMERICA,
Defendant - Appellee

08/29/2016	1 36 pg, 487.91 KB	U.S. civil case docketed. Fee paid. Transcript information sheet due by 09/12/2016. Docketing Statement due for Appellant Wisconsin Central Limited by 09/06/2016. Appellant's brief due on or before 10/11/2016 for Wisconsin Central Limited. [1] [6779052] [16-3300] (FP)
08/31/2016	2 2 pg 119.78 KB	ORDER: The court, on its own motion, orders that these appeals are CONSOLIDATED for purposes of briefing and disposition. The briefing schedule is as follows: Appellants' respective briefs due on or before 10/11/2016 for Wisconsin Central Limited, Illinois Central Railroad Company and Grand Trunk Western Railroad Company. Appellee's consolidated brief due on or before 11/10/2016 for United States of America. Appellants' respective reply briefs, if any, are due on or before 11/28/2016 for Appellants Wisconsin Central Limited, Illinois Central Railroad Company and Grand Trunk Western Railroad Company. Counsel for appellants are encouraged to avoid unnecessary duplication by filing a joint brief or a joint appendix or by adopting parts of a co-

		appellant's brief. Duplicative briefing will be stricken and may result in disciplinary sanctions against counsel. See United States v. Torres, 170 F.3d 749 (7th Cir. 1999); United States v. Ashman, 964 F.2d 596 (7th Cir. 1992). Appellants, however, may not adopt the "Jurisdictional Statement" of another. Each appellant's brief must include a complete "Jurisdictional Statement". Appellee's brief must comply with Circuit Rule 28(b). DW [2] [6779497] [16-3300, 16-3303, 16-3304] (CD)
09/02/2016	3 4 pg, 505.19 KB	Docketing Statement filed by Appellant Wisconsin Central Limited. Prior or Related proceedings: No. [3] [6779964] [16-3300] (McKenna, William)
09/09/2016	4 3 pg, 188.04 KB	Added Attorney(s) Jacob Earl Christensen for party(s) Appellee USA, in case 16-3300 Attorney(s) Jacob Earl Christensen for party(s) Appellee USA, in case 16-3303 Attorney(s) Jacob Earl Christensen for party(s) Appellee USA, in case 16-3304 per appearance form. Appearance form filed by Attorney Jacob E. Christensen for Appellee USA in 16-3300, 16-3303, 16-

		3304. [4] [6781272] (L-Yes; E-Yes; R-No) [16- 3300, 16-3303, 16-3304]--[Edited 09/09/2016 by AD to reflect the addition of counsel.] (Christensen, Jacob)
09/12/2016	5 2 pg, 252.66 KB	Circuit Rule 26.1 Disclosure Statement and Appearance filed by Attorney William J. McKenna, Jr. [5] [6781800] (L-Yes; E-Yes; R-No) [16-3300, 16-3303, 16-3304] (McKenna, William)
09/12/2016	6 1 pg, 142.37 KB	Filed Certificate of Service to Disclosure Statement/Appearance of William J. McKenna, Jr. filed on 09/12/2016 by Appellant Wisconsin Central Limited in 16-3300, Appellant Illinois Central Railroad Company in 16-3303, Appellant Grand Trunk Western Railroad Company in 16-3304. [6] [6781804] [16- 3300, 16-3303, 16-3304] (McKenna, William)
09/12/2016	7 2 pg 253.83 KB	Circuit Rule 26.1 Disclosure Statement and Appearance filed by Attorney Jonathan W. Garlough for Appellant Wisconsin Central Limited in 16-3300, Appellant Illinois Central Railroad Company in 16-3303, Appellant Grand Trunk Western Railroad Company in 16-3304. [7]

		[6781810] (L-No; E-Yes; R-No) [16-3300, 16-3303, 16-3304] (Garlough, Jonathan)
09/12/2016	8 1 pg, 142.37 KB	Filed Certificate of Service to Disclosure Statement/Appearance of Jonathan W. Garlough filed on 09/12/2016 by Appellant Wisconsin Central Limited in 16-3300, Appellant Illinois Central Railroad Company in 16-3303, Appellant Grand Trunk Western Railroad Company in 16-3304. [8] [6781812] [16-3300, 16-3303, 16-3304] (Garlough, Jonathan)
09/29/2016	9 7 pg, 355.23 KB	Motion filed by Appellant Wisconsin Central Limited in 16-3300, Appellant Illinois Central Railroad Company in 16-3303, Appellant Grand Trunk Western Railroad Company in 16
09/29/2016	10 1 pg, 96.63 KB	Order issued GRANTING motion to extend time to file appellant's brief. 1. The appellants shall file their respective briefs and required short appendices on or before November 10, 2016. 2. The appellee shall file its consolidated brief on or before December 12, 2016. 3. The appellants shall file their respective reply briefs, if any, on or before December 27, 2016. [9]

		CMD [10] [6786834] [16-3300, 16-3303, 16-3304] (FP)
11/03/2016	11 3 pg, 195.44 KB	Circuit Rule 26.1 Disclosure Statement and Appearance filed by Attorney Richard Riley for Appellant Wisconsin Central Limited in 16-3300, Appellant Illinois Central Railroad Company in 16-3303, Appellant Grand Trunk Western Railroad Company in 16-3304. [11] [6795341] (L-No; E-Yes; R-No)
11/10/2016	12 71 pg, 2.28 MB	Submitted appellant brief by William J. McKenna for Appellant Wisconsin Central Limited in 16-3300, Appellant Illinois Central Railroad Company in 16-3303, Appellant Grand Trunk Western Railroad Company in 16-3304. [12] [6797151] [16-3300, 16-3303, 16-3304] (McKenna, William)
11/10/2016	13 47 pg, 1.01 MB	Submitted Appendix by William J. McKenna for Appellant Wisconsin Central Limited in 16-3300, Appellant Illinois Central Railroad Company in 16-3303, Appellant Grand Trunk Western Railroad Company in 16-3304. [13] [6797152] [16-3300,

		16-3303, 16-3304] (McKenna, William)
11/10/2016	14 71 pg, 2.29 MB	Appellant's brief filed by Appellant Wisconsin Central Limited in 16-3300, Appellant Illinois Central Railroad Company in 16-3303, Appellant Grand Trunk Western Railroad Company in 16-3304. Paper copies due on 11/21/2016 Electronically Transmitted. [14] [6797231] [16-3300, 16-3303, 16-3304] (AB)
11/10/2016	15 47 pg, 1.01 MB	Filed Appendix by Appellant Wisconsin Central Limited in 16-3300, Appellant Illinois Central Railroad Company in 16-3303, Appellant Grand Trunk Western Railroad Company in 16-3304. Paper copies due on 11/21/2016. [15] [6797232] [16-3300, 16-3303, 16-3304] (AB)
11/14/2016	16 3 pg, 109.97 KB	Attorney Jacob Earl Christensen for USA in 16-3300, USA in 16-3303 and USA in 16-3304 terminated and added Attorney(s) Ellen P. DelSole for party(s) Appellee USA, in case 16-3300 Attorney(s) Ellen P. DelSole for party(s) Appellee USA, in case 16-3303 Attorney(s) Ellen P. DelSole for party(s) Appellee

		USA, in case 16-3304 per appearance form. Appearance form filed by Attorney Ellen Page DelSole for Appellee USA in 16-3300, 16-3303, 16-3304. [16] [6797505] (L-Yes; E-Yes; R-Yes) [16-3300, 16-3303, 16-3304]--[Edited 11/14/2016 by AD to reflect the termination and addition of counsel.] (DelSole, Ellen)
11/17/2016	17 41 pg, 231.63 KB	Submitted brief by Maureen A. McGuire, Kathryn D. Kirmayer, Daniel Saphire, and Janet L. Bartelmay for amicus Association of American Railroads. Consent from all parties contained within brief. [17] [6798374] [16-3300, 16-3303, 16-3304] (McGuire, Maureen)
11/17/2016	18 41 pg, 253.67 KB	Amicus brief filed by Amicus Curiae Association of American Railroads by consent. Paper copies due on 11/25/2016 Electronically Transmitted. [18] [6798745] [16-3300] (CO)
11/28/2016	19 7 pg, 69.99 KB	Motion filed by Appellee USA in 16-3300, 16-3303, 16-3304 to extend time to file appellee brief. [19] [6800291] [16-3300, 16-3303, 16-3304] (DelSole, Ellen)

11/29/2016	20 1 pg, 128.49 KB	Order issued GRANTING motion to extend time to file appellee's brief [19] The appellee shall file its consolidated brief due on or before 01/11/2017 for United States of America. Appellants' reply briefs, if any, are due on or before 01/25/2017 for Appellants Wisconsin Central Limited, Illinois Central Railroad Company and Grand Trunk Western Railroad Company. CMD [20] [6800383] [16-3300, 16-3303, 16-3304] (VG)
01/11/2017	21 3 pg, 104.23 KB	Appearance form filed by Attorney Francesca Ugolini (co-counsel) for Appellee USA in 16-3300, 16-3303, 16-3304. [21] [6810726] (L-No; E-Yes; R-No) [16-3300, 16-3303, 16-3304]--[Edited 01/11/2017 by MM to reflect addition of counsel.] (Ugolini, Francesca)
01/11/2017	22 97 pg, 425.34 KB	Submitted appellee brief by Ellen Page DelSole for Appellee USA in 16-3300, 16-3303, 16-3304. [22] [6810759] [16-3300, 16-3303, 16-3304] (DelSole, Ellen)
01/11/2017	23 97 pg, 502.23 KB	Appellee's brief filed by Appellee USA in 16-3300, 16-3303, 16-3304. Paper copies due on 01/19/2017 Electronically

		Transmitted. [23] [6811081] [16-3300, 16-3303, 16-3304] (CO)
01/18/2017	24 2 pg, 87.95 KB	Notice to the District Court to transmit the record on appeal. [24] [6812370] [16-3300, 16-3303, 16-3304] (RS)
01/18/2017	25 295 pg, 6.01 MB	Original record on appeal filed electronically. Contents of record : 1 vol. of pleadings. [25] [6812572] [16-3304] (NR)
01/23/2017	26 1285 pg, 41.71 MB	Original record on appeal filed electronically. Contents of record : 3 vol. of pleadings. [26] [6813279] [16-3300] (SK)
01/25/2017	27 21 pg, 193.79 KB	Submitted appellant reply brief by William J. McKenna for Appellant Wisconsin Central Limited in 16-3300, Appellant Illinois Central Railroad Company in 16-3303, Appellant Grand Trunk Western Railroad Company in 16-3304. [27] [6814244] [16-3300, 16-3303, 16-3304] (McKenna, William)
01/25/2017	28 21 pg, 108.96 KB	Appellant's reply brief filed by Appellant Wisconsin Central Limited in 16-3300, Appellant Illinois Central Railroad Company in 16-3303, Appellant Grand Trunk Western Railroad Company in 16-3304. Paper cop-

		ies due on 02/02/2017 Electronically Transmitted. [28] [6814263] [16-3300, 16-3303, 16-3304] (RS)
02/08/2017	29 2 pg, 93.58 KB	Brief deficiency letter sent to Appellant Wisconsin Central Limited in 16-3300, Appellant Illinois Central Railroad Company in 16-3303, Appellant Grand Trunk Western Railroad Company in 16-3304. The Appellant Reply brief was electronically filed on 01/25/2017. The paper copies of this brief were due to be submitted to the Clerk's Office by 02/02/2017. The paper copies have not been received by this court. Paper copies due on 02/15/2017 or the court may issue a Rule of Show Cause order pursuant to Circuit Rule 31. [29] [6817233] [16-3300, 16-3303, 16-3304] (FI)
02/13/2017	30 4 pg, 138.25 KB	Argument set for Thursday, March 30, 2017, at 9:30 a.m. in the Main Courtroom, Room 2721. Each side limited to 15 minutes. [30] [6818243] [16-3300, 16-3303, 16-3304] (RS)
02/14/2017	31 1 pg, 247.03 KB	Received argument confirmation from Ellen Page DelSole for Appellee USA in 16-3300, 16-3303, 16-3304. [31] [6818753]

		[16-3300, 16-3303, 16-3304] (DelSole, Ellen)
03/16/2017	32 15 pg, 1.26 MB	Motion filed by Appellee USA in 16-3300, 16-3303, 16-3304 to extend time to file appellee brief. [19] [6800291] [16-3300, 16-3303, 16-3304] (DelSole, Ellen)
03/21/2017	33 1 pg, 36.75 KB	Received argument confirmation from Richard F. Riley Jr. for Appellant Wisconsin Central Limited in 16-3300, Appellant Illinois Central Railroad Company in 16-3303, Appellant Grand Trunk Western Railroad Company in 16-3304. [33] [6827550] [16-3300, 16-3303, 16-3304] (Riley, Richard)
03/29/2017	34 2 pg, 91.58 KB	Argument reset for Thursday, March 30, 2017 at 9:30 a.m. in the Main Courtroom, Room 2721. Each side limited to 10 minutes. [34] [6829546] [16-3300, 16-3303, 16-3304] (RS)
03/30/2017	35	Case heard and taken under advisement by panel: Richard A. Posner, Circuit Judge; Daniel A. Manion, Circuit Judge and David F. Hamilton, Circuit Judge. [35] [6829940] [16-3303, 16-3300, 16-3304] (RS)
03/30/2017	36	Case argued by Mr. Richard F. Riley, Jr. for Appellant Illinois

		Central Railroad Company and Mrs. Ellen P. DelSole for Appellee USA in 16-3303, Mr. Richard F. Riley, Jr. for Appellant Wisconsin Central Limited and Mrs. Ellen P. DelSole for Appellee USA in 16-3300, Mr. Richard F. Riley, Jr. for Appellant Grand Trunk Western Railroad Company and Mrs. Ellen P. DelSole for Appellee USA in 16-3304. [36] [6829941] [16-3303, 16-3300, 16-3304] (RS)
05/08/2017	37 12 pg, 174.62 KB	Filed opinion of the court by Judge Posner. AFFIRMED. Richard A. Posner, Circuit Judge; Daniel A. Manion, Circuit Judge, dissenting and David F. Hamilton, Circuit Judge. [37] [6839515] [16-3300, 16-3303, 16-3304] (AP)
05/08/2017	38 1 pg, 88.52 KB	ORDER: Final judgment filed per opinion. With costs: yes. [38] [6839518] [16-3300, 16-3303, 16-3304] (AP)
05/19/2017	39 4 pg, 75.76 KB	Filed Bill of Costs by Appellee USA in 16-3300, 16-3303, 16-3304 in the amount of $101.85. [39] [6842329] [16-3300, 16-3303, 16-3304] (DelSole, Ellen)

06/22/2017	40 0 pg, 0 KB	Submitted petition for rehearing enbanc by William J. McKenna for Appellant Wisconsin Central Limited in 16-3300, Appellant Illinois Central Railroad Company in 16-3303, Appellant Grand Trunk Western Railroad Company in 16-3304. [40] NOTE: Access to this entry is limited to counsel of record. Once the document is approved by the court, it will be filed onto the court's docket as a separate entry which will be open to the public. [6849633] [16-3300, 16-3303, 16-3304] (McKenna, William)
06/22/2017	41 22 pg, 181.68 KB	Filed Petition for Rehearing and Petition for Rehearing Enbanc by Appellant Wisconsin Central Limited in 16-3300, Appellant Illinois Central Railroad Company in 16-3303, Appellant Grand Trunk Western Railroad Company in 16-3304. Paper copies due on 06/26/2017 [41] [6849699] [16-3300, 16-3303, 16-3304] (GW)
07/12/2017	42 1 pg, 66.06 KB	ORDER: Appellant Wisconsin Central Limited in 16-3300, Appellant Illinois Central Railroad Company in 16-3303, Appellant Grand Trunk Western Railroad Company in 16-3304 Petition for

		Rehearing and Petition for Rehearing Enbanc is DENIED. * Circuit Judge Daniel A. Manion voted to grant the petition for rehearing. For the reasons stated in my dissent from the panel opinion and in the Railroads' petition for rehearing, I would grant the petition. In my opinion, the panel's majority opinion creates an intra-circuit conflict over the proper method of statutory interpretation. This case is thus worthy of another look. [42] [6853578] [16-3300, 16-3303, 16-3304] (AD)
07/20/2017	43 4 pg, 180.04 KB	Mandate issued with bill of costs in the amount of $101.85. No record to be returned. [43] [6855450] [16-3300, 16-3303, 16-3304] (CR)
07/20/2017	____ 18 pg, 637.28 KB	FOR COURT USE ONLY: Certified copy of 05/08/2017 Opinion and Judgment and 07/12/2017 Certified Petition for Rehearing Denial Order with Mandate and Bill of Costs sent to the District Court Clerk. [6855460-2] [6855460] [16-3300, 16-3303, 16-3304] (CR)
10/11/2017	44 1 pg, 55.14 KB	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. 17-530

		[44] [6875620] [16-3300, 16-3303, 16-3304] (CAG)
01/16/2018	45 1 pg, 64.42 KB	Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari. 17-530. [45] [6896751] [16-3300, 16-3303, 16-3304] (CAG)

United States District Court
Northern District of Illinois - CM/ECF LIVE, Ver 6.2.1 (Chicago)
CIVIL DOCKET FOR CASE #: 1:14-cv-10243

Wisconsin Central Ltd. v. United States of America	Date Filed: 12/22/2014
Assigned to: Honorable Gary Feinerman	Date Terminated: 07/08/2016
Case in other court: 16-03300	Jury Demand: None
Cause: 26:7422 IRS: Refund Taxes	Nature of Suit: 870 Tax Suit: Taxes
	Jurisdiction: U.S. Government Defendant

Plaintiff

Wisconsin Central Ltd.	represented by **William J. McKenna, Jr.** Foley & Lardner 321 North Clark Street Suite 2800 Chicago, IL 60654 (312)832-4500 Email: wmckenna@foley.com *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

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Email: kspitz@foley.com
TERMINATED: 06/05/2015

V.

Defendant

United States of America

represented by
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ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
12/22/2014	1	COMPLAINT filed by Wisconsin Central Ltd.; Filing fee $ 400, receipt number 0752-10177308. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit, # 9 Exhibit, # 10 Exhibit, # 11 Exhibit, # 12 Exhibit, # 13 Exhibit, # 14 Exhibit, # 15 Civil Cover Sheet) (McKenna, William) (Entered: 12/22/2014)
12/22/2014	2	ATTORNEY Appearance for Plaintiff Wisconsin Central Ltd. by William J. McKenna, Jr (McKenna, William) (Entered: 12/22/2014)
12/22/2014	3	NOTIFICATION of Affiliates pursuant to Local Rule 3.2 by Wisconsin Central Ltd. re complaint, 1

		(McKenna, William) (Entered: 12/22/2014)
12/22/2014	4	ATTORNEY Appearance for Plaintiff Wisconsin Central Ltd. by Katherine Davis Spitz (Spitz, Katherine) (Entered: 12/22/2014)
12/22/2014		CASE ASSIGNED to the Honorable Gary Feinerman. Designated as Magistrate Judge the Honorable Jeffrey T. Gilbert. (sm,) (Entered: 12/22/2014)
12/23/2014		SUMMONS Issued as to U.S. Attorney (pg,) (Entered: 12/23/2014)
12/23/2014	5	MINUTE entry before the Honorable Gary Feinerman: Initial status hearing set for 2/19/2015 at 9:00 a.m. Initial Status Report shall be filed by 2/12/2015. Please see Judge Feinerman's web page (http://www.ilnd.uscourts.gov, to "District Judges," to "Judge Gary Feinerman," to "Initial Status Hearings" under Case Management Procedures) for details on the initial status hearing and Initial Status Report. Mailed notice. (jlj,) (Entered: 12/23/2014)
01/13/2015	6	SUMMONS Returned Executed by Wisconsin Central Ltd. as to United States of America served on 12/31/2014, answer due 3/01/2015 (Spitz, Katherine)

		(Docket text modified on 1/15/2015 by Clerk's Office.) (tlm). (Entered: 01/13/2015)
01/21/2015	7	DESIGNATION of Prashant Kolluri as U.S. Attorney for Defendant United States of America (Kolluri, Prashant) (Entered: 01/21/2015)
02/05/2015	8	ATTORNEY Appearance for Defendant United States of America by Noreene C. Stehlik (Stehlik, Noreene) (Entered: 02/05/2015)
02/06/2015	9	MOTION by Plaintiff Wisconsin Central Ltd. to reassign case *pursuant to Local Rule 40.4* (Spitz, Katherine) (Entered: 02/06/2015)
02/06/2015	10	NOTICE of Motion by Katherine Davis Spitz for presentment of motion to reassign case 9 before Honorable Gary Feinerman on 2/12/2015 at 09:00 AM. (Spitz, Katherine) (Entered: 02/06/2015)
02/10/2015	11	MINUTE entry before the Honorable Gary Feinerman: The 2/12/2015 motion hearing 9 is stricken and reset for 2/12/2015 at 9:15 a.m. TIME CHANGE ONLY. Mailed notice (lcw,) (Entered: 02/10/2015)
02/12/2015	12	MINUTE entry before the Honorable Gary Feinerman: Motion hear-

		ing held. Plaintiffs motion to reassign 9 is granted. In all three cases, Defendant shall answer or otherwise plead to the complaint by 4/2/2015. The court, with the concurrence of Judges Gettleman and Kennelly, recommends to the Executive Committee that Grand Trunk W. R.R. Co. v. United States, No. 14 C 10244 (Gettleman, J.), and Ill. Cent. R.R. Co. v. United States, No. 14 C 10246 (Kennelly, J.), be reassigned to Judge Feinerman's calendar. The 2/19/2015 status hearing 5 is stricken. Status hearing in all three cases is set for 4/14/2015 at 9:00 a.m. The parties in all three cases shall file a joint status report by 4/9/2015. Mailed notice (lcw,) (Entered: 02/12/2015)
04/02/2015	13	ANSWER to Complaint by United States of America(Stehlik, Noreene) (Entered: 04/02/2015)
04/09/2015	14	STATUS Report by Wisconsin Central Ltd. (McKenna, William) (Entered: 04/09/2015)
04/10/2015	15	MINUTE entry before the Honorable Gary Feinerman: The 4/14/2015 status hearing 12 is reset from 9:00 to 9:15. TIME CHANGE ONLY. Mailed notice. (lcw,) (Entered: 04/10/2015)

04/14/2015	16	MINUTE entry before the Honorable Gary Feinerman: Status hearing held and continued to 6/16/2015 at 9:00 a.m. Discovery shall be completed by 8/31/2015. Dispositive motions shall be filed by 9/28/2015. Mailed notice. (jlj,) (Entered: 04/15/2015)
06/05/2015	17	WITHDRAWING *Katherine D. Spitz* as counsel for Plaintiff Wisconsin Central Ltd. and substituting William J. McKenna, Jr as counsel of record (McKenna, William) (Entered: 06/05/2015)
06/16/2015	18	MINUTE entry before the Honorable Gary Feinerman: Status hearing held and continued to 8/20/2015 at 9:00 a.m. The parties reported on the progress of discovery. Mailed notice. (jlj,) (Entered: 06/16/2015)
08/20/2015	19	MINUTE entry before the Honorable Gary Feinerman: Status hearing held. At the parties' request, the 9/28/2015 dispositive motion deadline is vacated. In 14 C 10243, 14 C 10244, and 14 C 10246, Plaintiffs shall file a consolidated summary judgment motion by 10/28/2015; Defendant shall respond and file a cross-motion for summary judgment by 11/18/2015; Plaintiffs shall reply in support of

		their motion and respond to Defendant's motion by 12/2/2015; and Defendant shall reply in support of its motion by 12/16/2015. Status hearing set for 10/21/2015 at 9:00 a.m. If the parties agree that the 10/21/2015 hearing is unnecessary and should be re-set for mid-January, they should contact the Courtroom Deputy. Mailed notice (np,) (Entered: 08/20/2015)
10/22/2015	20	MINUTE entry before the Honorable Gary Feinerman: Status hearing held and continued to 1/21/2016 at 9:00 a.m. For the forthcoming summary judgment motions, the parties may file oversized principal briefs of up to 20 pages. Mailed notice, (jlj,) (Entered: 10/22/2015)
10/27/2015	21	RULE 56.1 Statement *Stipulations of Fact* (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Exhibit 15, # 16 Exhibit 16, # 17 Exhibit 17, # 18 Exhibit 18, # 19 Exhibit 19, # 20 Exhibit 20, # 21 Exhibit 21, # 22 Exhibit 22, # 23 Exhibit 23, # 24 Exhibit 24, # 25 Exhibit 25, # 26 Exhibit 26, # 27

		Exhibit 27, # 28 Exhibit 28, # 29 Exhibit 29, # 30 Exhibit 30, # 31 Exhibit 31, # 32 Exhibit 32, # 33 Exhibit 33, # 34 Exhibit 34, # 35 Exhibit 35, # 36 Exhibit 36, # 37 Exhibit 37, # 38 Exhibit 38, # 39 Exhibit 39, # 40 Exhibit 40, # 41 Exhibit 41, # 42 Exhibit 42, # 43 Exhibit 43, # 44 Exhibit 44, # 45 Exhibit 45) (McKenna, William) (Entered: 10/27/2015)
10/27/2015	22	RULE 56.1 Statement *Stipulations of Fact PREVIOUSLY FILED as document 21* (Attachments: # 1 Exhibit 46, # 2 Exhibit 47, # 3 Exhibit 48, # 4 Exhibit 49, # 5 Exhibit 50, # 6 Exhibit 51, # 7 Exhibit 52, # 8 Exhibit 53, # 9 Exhibit 54, # 10 Exhibit 55, # 11 Exhibit 56, # 12 Exhibit 57, # 13 Exhibit 58, # 14 Exhibit 59, # 15 Exhibit 60, # 16 Exhibit 61, # 17 Exhibit 62, # 18 Exhibit 63, # 19 Exhibit 64, # 20 Exhibit 65, # 21 Exhibit 66, # 22 Exhibit 67, # 23 Exhibit 68, # 24 Exhibit 69, # 25 Exhibit 70, # 26 Exhibit 71, # 27 Exhibit 72, # 28 Exhibit 73, # 29 Exhibit 74, # 30 Exhibit 75, # 31 Exhibit 76, # 32 Exhibit 77, # 33 Exhibit 78, # 34 Exhibit 79, # 35 Exhibit 80, # 36 Exhibit 81, # 37 Exhibit 82, # 38 Exhibit 83, # 39 Ex-

		hibit 84, # 40 Exhibit 85, # 41 Exhibit 86, # 42 Exhibit 87, # 43 Exhibit 88, # 44 Exhibit 89, # 45 Exhibit 90, # 46 Exhibit 91, # 47 Exhibit 92, # 48 Exhibit 93, # 49 Exhibit 94, # 50 Exhibit 95) (McKenna, William) (Entered: 10/27/2015)
10/28/2015	23	MOTION by Plaintiff Wisconsin Central Ltd. for summary judgment (McKenna, William) (Entered: 10/28/2015)
10/28/2015	24	MEMORANDUM by Wisconsin Central Ltd. in support of motion for summary judgment 23 (McKenna, William) (Entered: 10/28/2015)
11/18/2015	25	MOTION by Defendant United States of America for summary judgment (Stehlik, Noreene) (Entered: 11/18/2015)
11/18/2015	26	MEMORANDUM by Defendant United States of America in support of it's motion for summary judgment and in opposition to plaintiffs' motion for summary judgment (Stehlik, Noreene) (Docket text modified by Clerk's office on 11/20/2015) (sj,). (Entered: 11/18/2015)
12/02/2015	27	REPLY by Plaintiff Wisconsin Central Ltd. *Memorandum in*

		Support of Plaintiffs' Motion for Summary Judgment and Memorandum in Opposition to Defendant's Motion for Summary Judgment (McKenna, William) (Entered: 12/02/2015)
12/16/2015	28	REPLY by United States of America to reply 27, MOTION by Defendant United States of America for summary judgment 25 (Stehlik, Noreene) (Entered: 12/16/2015)
01/19/2016	29	MINUTE entry before the Honorable Gary Feinerman: The court will have questions regarding the pending summary judgment motions. Mailed notice. (jlj,) (Entered: 01/19/2016)
01/21/2016	30	MINUTE entry before the Honorable Gary Feinerman: Status hearing held and continued to 3/15/2016 at 9:00 a.m. Oral argument held on the pending cross-motions for summary judgment. Mailed notice. (jlj,) (Entered: 01/22/2016)
03/11/2016	31	MINUTE entry before the Honorable Gary Feinerman: Status hearing set for 3/15/2016 30 is stricken and re-set for 4/21/2016 at 9:00 a.m. Mailed notice. (jlj,) (Entered: 03/11/2016)

04/15/2016	32	MINUTE entry before the Honorable Gary Feinerman: Status hearing set for 4/21/2016 31 is stricken and re-set for 5/25/2016 at 9:00 a.m. Mailed notice. (jlj,) (Entered: 04/15/2016)
05/20/2016	33	MINUTE entry before the Honorable Gary Feinerman: Status hearing set for 5/25/2016 32 is stricken and re-set for 6/28/2016 at 9:00 a.m. Mailed notice. (jlj,) (Entered: 05/20/2016)
06/24/2016	34	MINUTE entry before the Honorable Gary Feinerman: Status hearing set for 6/28/2016 35 is stricken and re-set for 7/20/2016 at 9:00 a.m. Mailed notice. (jlj,) (Entered: 06/24/2016)
07/06/2016	35	SUPPLEMENT to motion for summary judgment 25, reply to response to motion 28 *Notice of supplemental authority* (Attachments: # 1 Exhibit Union Pacific RR Co opinion) (Stehlik, Noreene) (Entered: 07/06/2016)
07/08/2016	36	MINUTE entry before the Honorable Gary Feinerman: For the reasons set forth in the accompanying Memorandum Opinion and Order, Plaintiff's summary judgment motion 23 is denied, and Defendant's summary judgment motion 25 is granted. Enter judgment order.

		Status hearing set for 7/20/2016 34 is stricken. Civil case closed. Mailed notice. (jlj,) (Entered: 07/08/2016)
07/08/2016	37	MEMORANDUM Opinion and Order Written by the Honorable Gary Feinerman on 7/8/2016. Mailed notice.(jlj,) (Entered: 07/08/2016)
07/08/2016	38	ENTERED JUDGMENT on 7/8/2016. Mailed notice.(jlj,) (Entered: 07/08/2016)
08/29/2016	39	NOTICE of appeal by Wisconsin Central Ltd. regarding orders 38 Filing fee $ 505, receipt number 0752-12305466. (McKenna, William) (Entered: 08/29/2016)
08/29/2016	40	NOTICE of Appeal Due letter sent to counsel of record regarding notice of appeal 39 (ek,) (Entered: 08/29/2016)
08/29/2016	41	TRANSMITTED to the 7th Circuit the short record on notice of appeal 39. Notified counsel (ek,) (Entered: 08/29/2016)
08/30/2016	42	ACKNOWLEDGMENT of receipt of short record on appeal regarding notice of appeal 39; USCA Case No. 16-3300. (tt,) (Entered: 08/30/2016)
01/18/2017	43	NOTICE to Transmit Record on Appeal regarding notice of appeal

		39; USCA Case No. 16-3300. (bg,) (Entered: 01/18/2017)
01/19/2017	44	CERTIFIED and transmitted to the USCA for the 7th Circuit the long record on appeal 39 (USCA no. 16-3300) (ek,) (Entered: 01/19/2017)
01/19/2017	45	USCA RECEIVED on 1/19/2017 the long record regarding notice of appeal 39 (ek,) (Entered: 01/19/2017)
07/20/2017	46	MANDATE of USCA dated 7/20/2017 regarding notice of appeal 39; USCA No. 16-03300; No record to be returned. (nsf,) (Entered: 07/20/2017)
07/20/2017	47	CERTIFIED COPY OF USCA JUDGMENT dated 05/08/2017 regarding notice of appeal 39; USCA No. 16-3300. The judgments of the District Court are AFFIRMED, with costs, in accordance with the decision of this court entered on this date. (nsf,) (Entered: 07/20/2017)
07/20/2017	48	CERTIFIED copy of order dated 07/12/2017 from the Seventh Circuit regarding notice of appeal 39; Appellate case no.: 16-3300. On June 22, 2017, plaintiffs-appellants filed a petition for rehearing and rehearing en banc. A majority

		of the judges on the original panel have voted to deny the petition and none of the active judges has requested a vote on whether to rehear the case en banc.* The petition is therefore DENIED. (nsf,) (Entered: 07/20/2017)
07/20/2017	49	CERTIFIED COPY OF OPINION from the USCA for the 7th Circuit; Argued 03/30/2017; Decided 05/08/2017 in USCA case no. 16-3300 (nsf,) (Entered: 07/20/2017)
07/20/2017	50	BILL of Costs from the USCA, appeal no. 16-3300 (nsf,) (Entered: 07/20/2017)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

WISCONSIN CENTRAL LTD.,
Plaintiff,

v.

No. 14-cv-10243
Hon. Gary Feinerman

UNITED STATES OF AMERICA,
Defendant.

GRAND TRUNK WESTERN RAILROAD COMPANY,
Plaintiff,

v.

No. 14-cv-10244
Hon. Gary Feinerman

UNITED STATES OF AMERICA,
Defendant.

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff,

v.

No. 14-cv-10246
Hon. Gary Feinerman

UNITED STATES OF AMERICA,
Defendant.

STIPULATIONS OF FACT

The Plaintiffs in these three actions, which have been assigned or reassigned to Judge Feinerman and are being heard together as related cases under Local Rule 40.4, to wit:

Wisconsin Central Ltd. ("WCL"),

Grand Trunk Western Railroad Company ("GTW"), and

Illinois Central Railroad Company ("ICRR," and collectively with WCL and GTW, "Plaintiffs"),

and the Defendant, the United States of America ("United States" or "Defendant"), by undersigned counsel, hereby stipulate and agree as follows.

The statements of fact recited herein shall be considered true and correct. The exhibits and other documents referenced herein or attached hereto shall be considered authentic, true and correct copies of the original documents. The Court may rely on these statements and exhibits for purposes of any dispositive motions in these actions. All exhibits docketed in these actions or accompanying these stipulations are redacted as required in Fed. R. Civ. P. 5.2.

Nature of Case; Jurisdiction; Venue; Plaintiffs

1. These cases are actions for refund of federal employment taxes paid by each Plaintiff on its own behalf, and withheld by each Plaintiff from its employees and paid over to the Internal Revenue Service on their behalf, pursuant to the Railroad Retirement Tax Act ("RRTA"), 26 U.S.C. ("Internal Revenue Code" or "I.R.C.") §§ 3201 – 3241.

2. The primary issue in these cases is whether the income of certain employees in the form of corporate stock in Plaintiffs' publicly traded parent company, received by those employees at the time they exercised stock options previously granted to them in connection with their employment, is a form of "money remuneration" within the meaning of I.R.C. § 3231(e)(1), or whether instead it is excluded from the definition of "compensation" subject to tax under the RRTA pursuant to I.R.C. § 3231(e)(1).

3. The tax years (calendar years in each case) at issue for each Plaintiff are as follows:

   WCL: 2007 through 2011, and 2013.

   GTW: 2006 through 2012.

   ICRR: 2006 through 2013.

4. This Court has subject matter jurisdiction over these actions pursuant to 28 U.S.C. § 1346(a)(1).

5. Venue in these actions is proper in the United States District Court for the Northern District of Illinois pursuant to 28 U.S.C. § 1402(a)(2).

6. Each Plaintiff, and each predecessor corporation of each Plaintiff as identified in paragraphs 12-13 and 17 below, is (or was while it existed) a railroad "carrier" within the meaning of I.R.C. § 3231(g). Accordingly, each such corporation is a railroad "employer" within the meaning of I.R.C. § 3231(a), and each such corporation and its employees are liable for Railroad Retirement taxes imposed by the RRTA.

7. RRTA taxes are the payroll taxes paid by railroad employers and employees in lieu of the Social Security payroll taxes under the Federal Insurance Contributions Act ("FICA"), I.R.C. §§ 3101 – 3128, that are paid by non-rail employers and employees.

8. Plaintiffs are operating railroad companies with significant railroad operations in the Midwest and the Mississippi Valley throughout the years at issue in these actions (and continuing today).

9. Each Plaintiff, and each predecessor corporation of each Plaintiff as identified in paragraphs 12-13 and 17 below, is (or was while it existed during the years at issue) an indirect wholly owned subsidiary of Canadian National Railway Company ("CN"), a Canadian corporation whose shares are publicly traded on the New York Stock Exchange and the Toronto Stock Exchange. CN is an operating railroad company with transcontinental railroad operations throughout Canada.

WCL – Corporate Identity and Predecessor Corporations

10. Plaintiff WCL is a Delaware corporation with its principal place of business at 17641 S. Ashland Avenue, Homewood, Illinois 60430.

11. Plaintiff WCL is the successor in interest by merger to two corporations, identified in paragraphs 12-13 below, that filed certain of the tax returns and refund claims at issue in Docket No. 14-CV-10243.

12. A corporation named "Wisconsin Central Ltd." filed the tax returns and refund claims at issue

in Docket No. 14-CV-10243 for the 2007, 2008 and 2009 tax years. "Wisconsin Central Ltd." was merged into another corporation, effective March 31, 2013, that was immediately renamed Wisconsin Central Ltd. The latter corporation is the current Plaintiff in Docket No. 14-CV-10243 and is the successor in interest to the "Wisconsin Central Ltd." claims for 2007, 2008 and 2009.

13. A corporation named Duluth, Winnipeg and Pacific Railway Company ("DWP") filed the tax returns and refund claims at issue in Docket No. 14-CV-10243 for the 2010 and 2011 tax years. DWP was merged into the corporation named "Wisconsin Central Ltd.," described in paragraph 12 above, effective December 31, 2011. The latter corporation, successor by merger to DWP, was merged into another corporation, effective March 31, 2013, that was immediately renamed Wisconsin Central Ltd., as described in paragraph 12 above. The latter corporation is the current Plaintiff in Docket No. 14-CV-10243 and is the successor in interest to the DWP claims for 2010 and 2011.

14. Plaintiff WCL (the corporation currently existing) filed the tax return and refund claim at issue in Docket No. 14-CV-10243 for the 2013 tax year.

15. Accordingly, Plaintiff WCL is now responsible for all refund claims at issue in Docket No. 14-CV-10243, for all tax years 2007 through 2011 and tax year 2013, for itself and its predecessor corporations identified in paragraphs 12-13. References to "WCL" in these stipulations in-

clude WCL's predecessor corporations with respect to the 2007, 2008, 2009, 2010 and 2011 tax years.

GTW – Corporate Identity and Predecessor Corporation

16. Plaintiff GTW is a Michigan corporation with its principal place of business at 17641 S. Ashland Avenue, Homewood, Illinois 60430.

17. A corporation named "Grand Trunk Western Railroad Incorporated" filed the tax returns and the refund claims at issue in Docket No. 14-CV-10244 with respect to the 2006 and 2007 tax years. It was merged into another corporation effective August 31, 2008, which was immediately renamed "Grand Trunk Western Railroad Company." The latter corporation is the current Plaintiff in Docket No. 14-CV-10244 and is the successor in interest to the "Grand Trunk Western Railroad Incorporated" claims for 2006 and 2007.

18. Plaintiff GTW (the corporation currently existing) filed the tax returns and refund claims at issue in Docket No. 14-CV-10244 for the 2008, 2009, 2010, 2011 and 2012 tax years.

19. Accordingly, Plaintiff GTW is now responsible for all refund claims at issue in Docket No. 14-CV-10244, for all tax years 2006 through 2012, for itself and its predecessor corporation identified in paragraph 17. References to "GTW" in these stipulations include GTW's predecessor corporation with respect to the 2006 and 2007 tax years.

ICRR – Corporate Identity

20. Plaintiff ICRR is an Illinois corporation with its principal place of business at 17641 S. Ashland Avenue, Homewood, Illinois 60430.

21. Plaintiff ICRR filed the tax returns and refund claims at issue in Docket No. 14-CV-10246 for all tax years 2006 through 2013.

Stock Options – Overview

22. The CN stock options that were granted to certain employees of each Plaintiff, that were exercised during the years in issue (2006-2013) and that have given rise to the claims in these cases, were "nonqualified" stock options, sometimes referred to as NQSOs. In other words, the stock options at issue in these actions were not incentive stock options as defined in I.R.C. § 422(b) and were not part of an employee stock purchase plan as defined in I.R.C. § 423(b), and thus were not "qualified stock options" described in I.R.C. § 3231(e)(12).

23. The CN stock options at issue in these cases were generally issued and exercised as follows during the years in issue.

    a. The CN Board of Directors or a committee thereof determined which employees and non-employee directors of CN and its affiliates (including the Plaintiffs) would be granted nonqualified stock options to purchase shares of CN stock through CN's stock transfer agent (that is, the shares were "treasury shares," not previously issued shares), and the number of options each person would receive. The options had a 10-year term; that is, they had to be exercised

by the recipient within 10 years after issuance or they expired. Each option gave the employee the right to purchase one share of CN stock at a fixed exercise price equal to CN's publicly traded stock price as of the option grant date ("exercise price").

b. To exercise an option on a date of the optionee's choosing during the 10-year term, the employee communicated to CN's transfer agent the number of options that the employee wished to exercise. The exercise could occur in one of three ways chosen by the employee:

i. First method: the employee could send a cash payment for the exercise price of the CN shares being acquired plus tax withholdings and administrative costs, and all the CN shares being acquired would be transferred to the employee's personal brokerage account to be held as a stock investment by the employee (cash exercise). The current form submitted by an employee to elect a cash exercise is attached as Exhibit 76 (CN000721).

ii. Second method: the employee could request that the transfer agent sell enough of the CN shares being acquired to cover the exercise price of the shares, broker commissions, tax withholdings and administrative costs, and the remaining CN shares being acquired would be transferred to the employee's personal brokerage account to be held as a stock investment by the employee

(sell-to-cover exercise). The current form submitted by an employee to elect a sell-to-cover exercise is attached as Exhibit 77 (CN000722).

iii. Third method: the employee could request that the transfer agent sell the CN shares being acquired, and the cash proceeds of the sale of shares, net of the exercise price of the shares, broker commissions, tax withholdings and administrative costs, would be wired to the employee's bank account (cashless exercise). The current form submitted by an employee to elect a cashless exercise is attached as Exhibit 78 (CN000723).

iv. For the avoidance of doubt, the phrase "the related Plan" in the signature sections of Exhibits 76, 77 and 78 described in subparagraphs (i), (ii) and (iii) above refers to the CN Management Long Term Incentive Plan itself, and not any other or separate plan.

c. In all cases, and regardless of the exercise method chosen by the employee, each Plaintiff treated optionees who were U.S. citizens or residents, including the employees whose options are at issue in these cases, as receiving income for federal income tax purposes, and "compensation" for RRTA purposes, in the amount by which the publicly traded share price on the date of exercise exceeded the exercise price for each option exercised (the "spread on exercise").

24. Attached as Exhibit 24 (CN000302-305) are flowcharts describing in more detail the option issuance and exercise processes for nonqualified CN stock options granted to U.S. employees of CN and its affiliates, including the cash, sell-to-cover and cashless exercise alternatives. These flowcharts reflect the current (2015) processes, which were generally the same during the years at issue (2006-2013).

25. Some of the options at issue in these cases were "performance" options, meaning they were exercisable only upon CN's attainment of certain financial performance benchmarks in a given year, and were otherwise exercisable in accordance with the exercise procedures described in paragraph 23b above. Options that were not performance options were "conventional" options, meaning they were exercisable as described in paragraph 23b above without regard to any corporate financial performance criteria. Exhibit 16 (CN000191) (CN Intranet page describing "performance" and "conventional" options). Aspects of performance versus conventional options at issue in these cases are as follows:

    a. All options granted in 1999 and 2003 were performance options. The financial benchmarks for the exercise of the performance options granted in 1999 and 2003 are described in the Long Term Incentive Award Agreements for those years respectively, attached as Exhibit 92 (CN000773-776) and Exhibit 82 (CN000732-734).

b. Vesting of the 1999 options was entirely contingent on attainment of the performance criteria: "If any of the options do not vest because one or both of the performance criteria are not met by the fourth anniversary of the grant, they expire immediately." Exhibit 92 (CN000774). In contrast, the 2003 options became immediately exercisable on their sixth anniversary if they were not exercisable earlier based on attainment of the performance criteria, see Exhibit 82 (CN000733); i.e. they were "performance accelerated."

c. The performance options granted in 1999 and 2003 made up approximately 27% of the options exercised during the years in issue (2006-2013). The remaining approximately 73% of the options exercised during the years in issue were conventional options.

d. The option spreadsheet described in paragraph 27 below, and attached as Exhibit 75 (CN000599-720), identifies the specific options exercised by a given employee in a given year as either performance or conventional. In such spreadsheet, the 1999 options are identified as "performance vested," and the 2003 options are identified as "perf accelerated vested."

e. Under a version of CN's stock option plan effective November 28, 1995 (see Exhibit 2 (CN000013-19)), two-thirds of the options issued under such plan were performance options and one-third were conventional options. No options exercised during

the years at issue in these cases (2006-2013) were issued under such 1995 plan. The two-thirds-performance-one-third-conventional split was eliminated in the version of the stock option plan effective May 7, 1996 (Exhibit 1 (CN000001-12)), which is the version of the stock option plan, as subsequently amended from time to time, under which all the options exercised during the years at issue in these cases were issued. Accordingly, the only performance options at issue in these cases were the performance options issued in 1999 and 2003, as described in subparagraphs (a) and (b) above.

26. Other stipulated aspects of the CN stock options and stock option program are as follows:

a. Except for the stock options granted to employees of Plaintiff ICRR in 1996 through 1998 (see paragraph 29.c below), the stock options at issue in these actions were awarded to employees under the Canadian National Railway Company Management Long-Term Incentive Plan ("CN Management Long-Term Incentive Plan" or "Plan"). Such plan has been in effect for CN and its subsidiaries since May 7, 1996 and remains in effect, as amended, today. Versions of the Plan as in effect during the years in issue are attached hereto as the Exhibits described in paragraph 29 and its subparagraphs, below.

b. The Plan was designed to attract and retain the services of selected employees who were in a position to make a material contribution to the success of the business.

See Exhibit 1 (CN000001), Exhibit 11 (CN000123).

c. A company newsletter published in 2000 describing the Plan states that stock options under the Plan are generally granted to executives, senior management and management employees of CN and its affiliates in recognition of the impact of their positions and their contribution to the overall results of the company. See Exhibit 13 (CN000156).

d. The same newsletter states: "Options are unlike salary as they do not come with a value known in advance. The gain from the option is linked to the performance of CN's share." Exhibit 13 (CN000155),

e. The same newsletter states: "CN has awarded stock options under the Management Long Term Incentive Plan since 1996, to encourage managers to create value for CN and shareholders, and to allow them to acquire a financial interest in the Company over time. As a result, more and more of your compensation is linked to results of the Company." Exhibit 13 (CN000155). The same statement is currently (2015) made almost verbatim in the CN Intranet site to describe the stock option plan. *See* Exhibit 16 (CN000191).

f. Despite the ten-year term of the stock options, options generally expire earlier in the event an optionee ceases to be employed by a CN affiliate. If an optionee is dismissed

for cause or voluntarily terminates employment, the options expire immediately. The options of optionees who are no longer employed by a CN affiliate due to retirement or death generally expire either at the end of the option period or within 12 months (death) or 36 months (retirement). See Exhibit 1 (CN000006-8), Exhibit 11 (CN000129-130).

g. Options are awarded primarily to executives and managers, although a small proportion are awarded to rank-and-file employees. See Exhibit 12 (CN000137).

h. Effective March 8, 2005, non-employee directors are not eligible to be awarded stock options under the Plan. Exhibit 1 (CN000005), Exhibit 11 (CN000128).

Spreadsheet of Options Granted and Exercised, Shares Retained and Sold, Etc.

27. Attached hereto as Exhibit 75 (CN000599-720) is a true copy of printouts of a spreadsheet prepared by Plaintiffs in which Plaintiffs set forth numeric and computational details with respect to the stock options exercised during the years in issue in these cases (2006-2013) by the employees of Plaintiffs. The complete spreadsheet has also been provided to Defendant in native Excel format. The spreadsheet includes details such as number of options exercised; specific date of exercise; grant date of options exercised; exercise type (cash exercise, sell-to-cover exercise, or cashless exercise); performance versus conventional options; number of CN shares retained by the employees as a stock

investment; and number of shares sold at the time of exercise, on both a cumulative annual basis and an individual transaction-by-transaction basis. The spreadsheet is a summary of and is based upon the business records of CN made at the time of the transactions described, by a person with knowledge, as part of CN's regular practice of recording its business activities. The United States agrees it has been given an opportunity to examine the underlying business records summarized in this spreadsheet.

28. In paragraph 22 above, the parties stipulate that all the stock options involved in these cases are nonqualified stock options or NQSOs. In four of the total 1,834 option exercises reflected in Exhibit 75, however, employees of WCL during the years in issue exercised incentive stock options (ISOs) that were originally issued as WCL ISOs and had been converted to CN ISOs as of the time of exercise. These four ISO exercises are shown in rows 660, 709, 1311 and 1413 of the spreadsheet entitled "HR Data 06-13" in the Excel version of Exhibit 75. Because the options in these four instances were ISOs and were thus "qualified stock options" described in I.R.C. § 3231(e)(12), those specific options are not at issue in Plaintiffs' motion for summary judgment due to be filed by October 28, 2015.

Stock Option Plans and Related Documents

29. The stock options at issue in these cases were exercised by Plaintiffs' employees during the years in issue (2006-2013) and were granted to the employees during the years 19962012. The

written plans governing such stock options were as follows:

a. At the times when all the options at issue were exercised by Plaintiffs' employees during the years in issue (2006-2013), the Canadian National Railway Company Management Long-Term Incentive Plan ("CN Management Long-Term Incentive Plan") was the written plan governing all such options. Such plan has been in effect for CN and its subsidiaries since May 7, 1996 and remains in effect today. A true copy of such plan in the form in which it existed from March 4, 2008 through all the years in issue is attached as Exhibit 1 (CN000001-12; another copy at CN000096-107).

b. True copies of the written plans governing the stock options at issue in these cases (except for ICRR stock options issue during 1996 through 1998 as described in subparagraph (c) below), reflecting the terms of the plan, as amended from time to time, during the periods when such options were issued and continuing through the date of these stipulations, are attached as follows:

i. Exhibit 2 – Canadian National Railway Company Management Stock Option Plan, effective as of November 28, 1995 (CN000013-19).

ii. Exhibit 3 – Canadian National Railway Company Management Long-Term Incentive Plan, effective as of May

7, 1996 (CN000020-33). This plan replaced Exhibit 2 referenced immediately above, and was the first version of the CN Long-Term Incentive Plan in effect throughout the years in issue.

iii. Exhibit 4 – Canadian National Railway Company Management Long-Term Incentive Plan – January 19, 1999 amendment approval (CN000034-47).

iv. Exhibit 5 – Canadian National Railway Company Management Long-Term Incentive Plan – January 23, 2001 amendment approval (CN000048-56).

v. Exhibit 6 – Canadian National Railway Company Management Long-Term Incentive Plan – January 22, 2002 amendment approval (CN000057-65).

vi. Exhibit 7 – Canadian National Railway Company Management Long-Term Incentive Plan – March 8, 2005 amendment approval (CN000066-74).

vii. Exhibit 8 – Canadian National Railway Company Management Long-Term Incentive Plan – March 6, 2007 amendment approval (CN000075-95).

viii. Exhibit 9 – CN Management Long-Term Incentive Plan – adopted May 7, 1996; as amended through, and effective as of, March 4, 2008 (CN000096-107).

ix. Exhibit 10 – Canadian National Railway Company Management Long-Term Incentive Plan – January

26, 2015 amendment approval (CN000108-122).

x. Exhibit 11 – Canadian National Railway Company Management Long-Term Incentive Plan – as amended on January 27, 2015 (CN000123-135).

c. The shares of Illinois Central Corporation, the holding company of Plaintiff ICRR, were acquired by CN effective June 4, 1998. Some of the stock options exercised by ICRR employees during the years in issue in Docket No. 12-CV-10246 were issued to the employees during the 1996-1998 period, and were converted to CN options upon the acquisition. True copies of the written plans and related documents covering stock options issued by ICRR during the pre-acquisition 1996-1998 period, some of which were exercised during the years in issue, are attached as follows:

i. Exhibit 17 – Illinois Central Railroad Company Executive Performance Compensation Program, adopted November 23, 1993 (CN000197-207).

ii. Exhibit 18 – Illinois Central Corporation 1990 Long Term Incentive Plan – as amended November 29, 1990, April 28, 1992, April 22, 1993 and February 10, 1994 (CN000208-223).

iii. Exhibit 19 – Illinois Central Corporation Form for Directors' Incentive 2000 Option Plan (CN000224-228).

iv. Exhibit 20 – Procedure to Exercise Illinois Central Corporation Options Converted to CN Options (CN000229-232).

v. Exhibit 21 – IC Employees Grant of Options Trust Agreement – January 19, 1999 (CN000233-245).

vi. Exhibit 22 – Conversion of Illinois Central Options – Consent Request Sent to Montreal Stock Exchange (CN000246-288).

30. True copies of the individual Option Agreements provided to and accepted by employees to whom stock options were granted each year, as a condition of their receipt of the options, are attached as follows. These agreements covered both the stock options (NQSOs) involved in these cases and also Restricted Stock Units (RSUs) granted to some employees; RSUs are not involved in these cases. With respect to the agreements for options issued in 2002 and thereafter, the employee's acceptance of the agreement was confirmed by clicking an online link rather than signing the paper agreement. No options at issue in the instant cases were issued by CN in 2004. The latest year in which any of the options at issue in the instant cases were issued is 2012.

a. Exhibit 92 – Long Term Incentive Award Agreement form with respect to stock options issued in 1999 (CN000773-776).

b. Exhibit 79 – Long Term Incentive Award Agreement form with respect to

stock options issued in 2000 (CN000724-726).

c. Exhibit 80 – Long Term Incentive Award Agreement form with respect to stock options issued in 2001 (CN000727-729).

d. Exhibit 81 – Long Term Incentive Award Agreement form with respect to stock options issued in 2002 (CN000730-731).

e. Exhibit 82 – Long Term Incentive Award Agreement form with respect to stock options issued in 2003 (CN000732-734).

f. Exhibit 83 – Long Term Incentive Award Agreement form with respect to stock options issued in 2005 (CN000735-737).

g. Exhibit 84 – Long Term Incentive Award Agreement form with respect to stock options issued in 2006 (CN000738-740).

h. Exhibit 85 – Long Term Incentive Award Agreement form with respect to stock options issued in 2007 (CN000741-743).

i. Exhibit 86 – Long Term Incentive Award Agreement form with respect to stock options issued in 2008 (CN000744-746).

j. Exhibit 87 – Long Term Incentive Award Agreement form with respect to

stock options issued in 2009 (CN000747-749).

k. Exhibit 88 – Long Term Incentive Award Agreement form with respect to stock options issued in 2010 (CN000750-752).

l. Exhibit 89 – Long Term Incentive Award Agreement form with respect to stock options issued in 2011 (CN000753-759).

m. Exhibit 90 – Long Term Incentive Award Agreement form with respect to stock options issued in 2012 (CN000760-766).

31. The version of the CN Management Long Term Incentive Plan dated January 26, 2015 and adopted by the CN Board January 27, 2015 (Exhibits 10 and 11 (CN000108-135)) makes reference (CN000108) to the following additional plans and policies, which are not stock option plans:

a. A Restricted Share Units Plan ("SUP"), of which a copy as adopted in 2004 and amended through January 1, 2011 is attached as Exhibit 93 (CN000777-791).

b. An Annual Incentive Bonus Plan ("AIBP"), of which a copy of the most recently updated summary (January 2012) made available to employees is attached as Exhibit 94 (CN000792-796).

c. A Voluntary Incentive Deferral Plan, of which a copy as adopted in 2002 and

amended through January 1, 2009 is attached as Exhibit 95 (CN000797-807).

32. True copies of CN documents describing various aspects of the stock options at issue in these cases are attached as follows:

a. Exhibit 12 – 2014 annual assumptions analysis for valuing CN stock options, March 28, 2014 (CN000136-154).

b. Exhibit 13 – Communications to Employees: Four newsletters explaining CN Management Long-Term Incentive Plan, issued in 2000, fourth newsletter amended 2004 (CN000155-172).

c. Exhibit 14 – CN Stock Ownership Guidelines for Senior Management Employees (approved 1999, amended 2002, 2004, 2010) (CN000173-174).

d. Exhibit 15 – Exercise and Sell of Options by US Employees – Tax Treatment Memorandum – July 31, 1998 (CN000175-186).

e. Exhibit 16 – Overview and Explanation of CN Management Long-Term Incentive Plan – CN intranet pages, accessed June 8, 2015 (CN000187-196).

f. Exhibit 23 – CN annual shareholders' meeting notices for 1998, 2005 and 2007, including proposed Management Long Term Incentive Plan amendments (CN000289-301).

g. Exhibit 25 – Excerpts from CN public offering prospectus, including description of

original stock option plan (Exhibit 2) (CN000306-316).

h. Exhibit 26 – Internal description of Management Long Term Incentive Plan in 1997 CN proxy statement, from CN Law (CN000317).

i. Exhibit 91 – Communication to employees regarding converted Illinois Central options, September 30, 1998 (CN000767-772).

WCL – 2007 Tax Year

33. On or before February 29, 2008, Plaintiff WCL timely filed Form CT-1, Employer's Annual Railroad Retirement Tax Return, for the taxable year ended December 31, 2007, with the Internal Revenue Service Center, Cincinnati, Ohio 45999. WCL paid the employer and employee taxes shown as due on the return. WCL's 2007 tax return (Form CT-1) was attached to the Complaint filed in Docket No. 14-CV-10243, and a true copy is attached hereto as Exhibit 27 (CN000318-320).

34. On May 12, 2010, by certified mail, within the three-year period provided by I.R.C. § 6511(a), WCL timely filed with the Internal Revenue Service, Cincinnati, Ohio 45999, its claim for refund (Form CT-1X) of Railroad Retirement taxes paid to the IRS, and withheld from its employees and paid over to the IRS on their behalf, by WCL for the year 2007 in the amount of $60,536, plus interest as allowed by law. Such claim for refund was for Railroad Retirement taxes paid by WCL, and withheld by WCL from

its employees and paid over, with respect to employees' income in the form of corporate stock on the exercise of nonqualified stock options as described in paragraphs 22-26 above. (Defendant does not stipulate to the correctness of any of the grounds for refund stated in this or any refund claims filed by Plaintiffs in these actions.) WCL's 2007 claim for refund (Form CT-1X) was attached to the Complaint filed in Docket No. 14-CV-10243, and a true copy is attached hereto as Exhibit 28 (CN000321-328).

35. On May 14, 2013, by certified mail, the Internal Revenue Service mailed its official notice of disallowance of WCL's claim for refund for tax year 2007. The official notice of claim disallowance was attached to the Complaint filed in Docket No. 14-CV-10243, and a true copy is attached hereto as Exhibit 29 (CN000329-330).

36. No portion of the refund claimed by WCL for tax year 2007 has been paid to WCL.

37. The Complaint in Docket No. 14-CV-10243 was timely filed by WCL on December 22, 2014 with respect to tax year 2007, pursuant to I.R.C. § 6532(a), prior to the expiration of two years after the date of mailing of the notice of disallowance.

WCL – 2008 Tax Year

38. On or before March 2, 2009, Plaintiff WCL timely filed Form CT-1, Employer's Annual Railroad Retirement Tax Return, for the taxable year ended December 31, 2008, with the Internal Revenue Service Center, Cincinnati, Ohio 45999. WCL paid the employer and employee taxes shown as due on the return.

WCL's 2008 tax return (Form CT-1) was attached to the Complaint filed in Docket No. 14-CV-10243, and a true copy is attached hereto as Exhibit 30 (CN000331-333).

39. On May 12, 2010, by certified mail, within the three-year period provided by I.R.C. § 6511(a), WCL timely filed with the Internal Revenue Service, Cincinnati, Ohio 45999, its claim for refund (Form CT-1X) of Railroad Retirement taxes paid to the IRS, and withheld from its employees and paid over to the IRS on their behalf, by WCL for the year 2008 in the amount of $51,288, plus interest as allowed by law. Such claim for refund was for Railroad Retirement taxes paid by WCL, and withheld by WCL from its employees and paid over, with respect to employees' income in the form of corporate stock on the exercise of nonqualified stock options as described in paragraphs 22-26 above. (Defendant does not stipulate to the correctness of any of the grounds for refund stated in this or any refund claims filed by Plaintiffs in these actions.) WCL's 2008 claim for refund (Form CT-1X) was attached to the Complaint filed in Docket No. 14-CV-10243, and a true copy is attached hereto as Exhibit 31 (CN000334-341).

40. On May 14, 2013, by certified mail, the Internal Revenue Service mailed its official notice of disallowance of WCL's claim for refund for tax year 2008. The official notice of claim disallowance was attached to the Complaint filed in Docket No. 14-CV-10243, and a true copy is attached hereto as Exhibit 29 (CN000329-330).

41. No portion of the refund claimed by WCL for tax year 2008 has been paid to WCL.

42. The Complaint in Docket No. 14-CV-10243 was timely filed by WCL on December 22, 2014 with respect to tax year 2008, pursuant to I.R.C. § 6532(a), prior to the expiration of two years after the date of mailing of the notice of disallowance.

WCL – 2009 Tax Year

43. On or before February 28, 2010, Plaintiff WCL timely filed Form CT-1, Employer's Annual Railroad Retirement Tax Return, for the taxable year ended December 31, 2009, with the Internal Revenue Service Center, Cincinnati, Ohio 45999. WCL paid the employer and employee taxes shown as due on the return. WCL's 2009 tax return (Form CT-1) was attached to the Complaint filed in Docket No. 14-CV-10243, and a true copy is attached hereto as Exhibit 32 (CN000342-344).

44. On May 12, 2010, by certified mail, within the three-year period provided by I.R.C. § 6511(a), WCL timely filed with the Internal Revenue Service, Cincinnati, Ohio 45999, its claim for refund (Form CT-1X) of Railroad Retirement taxes paid to the IRS, and withheld from its employees and paid over to the IRS on their behalf, by WCL for the year 2009 in the amount of $33,473, plus interest as allowed by law. Such claim for refund was for Railroad Retirement taxes paid by WCL, and withheld by WCL from its employees and paid over, with respect to employees' income in the form of corporate stock on the exercise of nonqualified stock options as described in paragraphs 22-26 above. (Defendant does not stipulate to the correctness of any of the grounds for refund stated in this or any

refund claims filed by Plaintiffs in these actions.) WCL's 2009 claim for refund (Form CT-1X) was attached to the Complaint filed in Docket No. 14-CV-10243, and a true copy is attached hereto as Exhibit 33 (CN000345-355).

45. On May 14, 2013, by certified mail, the Internal Revenue Service mailed its official notice of disallowance of WCL's claim for refund for tax year 2009. The official notice of claim disallowance was attached to the Complaint filed in Docket No. 14-CV-10243, and a true copy is attached hereto as Exhibit 29 (CN000329-330).

46. No portion of the refund claimed by WCL for tax year 2009 has been paid to WCL.

47. The Complaint in Docket No. 14-CV-10243 was timely filed by WCL on December 22, 2014 with respect to tax year 2009, pursuant to I.R.C. § 6532(a), prior to the expiration of two years after the date of mailing of the notice of disallowance.

WCL – 2010 Tax Year

48. On or before February 28, 2011, Plaintiff WCL timely filed Form CT-1, Employer's Annual Railroad Retirement Tax Return, for the taxable year ended December 31, 2010, with the Internal Revenue Service Center, Cincinnati, Ohio 45999. WCL paid the employer and employee taxes shown as due on the return. WCL's 2010 tax return (Form CT-1) was attached to the Complaint filed in Docket No. 14-CV-10243, and a true copy is attached hereto as Exhibit 34 (CN000356-357).

49. On September 26, 2012, by certified mail, within the three-year period provided by I.R.C.

§ 6511(a), WCL timely filed with the Internal Revenue Service, Cincinnati, Ohio 45999, its claim for refund (Form CT-1X) of Railroad Retirement taxes paid to the IRS, and withheld from its employees and paid over to the IRS on their behalf, by WCL for the year 2010 in the amount of $24,527.13, plus interest as allowed by law. Such claim for refund was for Railroad Retirement taxes paid by WCL, and withheld by WCL from its employees and paid over, with respect to employees' income in the form of corporate stock on the exercise of nonqualified stock options as described in paragraphs 22-26 above. (Defendant does not stipulate to the correctness of any of the grounds for refund stated in this or any refund claims filed by Plaintiffs in these actions.) WCL's 2010 claim for refund (Form CT-1X) was attached to the Complaint filed in Docket No. 14-CV-10243, and a true copy is attached hereto as Exhibit 35 (CN000358-366).

50. On December 26, 2012, by certified mail, the Internal Revenue Service mailed its official notice of disallowance of WCL's claim for refund for tax year 2010. The official notice of claim disallowance was attached to the Complaint filed in Docket No. 14-CV-10243, and a true copy is attached hereto as Exhibit 36 (CN000367-371).

51. No portion of the refund claimed by WCL for tax year 2010 has been paid to WCL.

52. The Complaint in Docket No. 14-CV-10243 was timely filed by WCL on December 22, 2014 with respect to tax year 2010, pursuant to I.R.C. §

6532(a), prior to the expiration of two years after the date of mailing of the notice of disallowance.

WCL – 2011 Tax Year

53. On or before February 29, 2012, Plaintiff WCL timely filed Form CT-1, Employer's Annual Railroad Retirement Tax Return, for the taxable year ended December 31, 2011, with the Internal Revenue Service Center, Cincinnati, Ohio 45999. WCL paid the employer and employee taxes shown as due on the return. WCL's 2011 tax return (Form CT-1) was attached to the Complaint filed in Docket No. 14-CV-10243, and a true copy is attached hereto as Exhibit 37 (CN000372).

54. On September 26, 2012, by certified mail, within the three-year period provided by I.R.C. § 6511(a), WCL timely filed with the Internal Revenue Service, Cincinnati, Ohio 45999, its claim for refund (Form CT-1X) of Railroad Retirement taxes paid to the IRS, and withheld from its employees and paid over to the IRS on their behalf, by WCL for the year 2011 in the amount of $27,226.44, plus interest as allowed by law. Such claim for refund was for Railroad Retirement taxes paid by WCL, and withheld by WCL from its employees and paid over, with respect to employees' income in the form of corporate stock on the exercise of nonqualified stock options as described in paragraphs 22-26 above. (Defendant does not stipulate to the correctness of any of the grounds for refund stated in this or any refund claims filed by Plaintiffs in these actions.) WCL's 2011 claim for refund (Form CT-1X) was attached to the Complaint

filed in Docket No. 14-CV-10243, and a true copy is attached hereto as Exhibit 38 (CN000373-381).

55. On December 26, 2012, by certified mail, the Internal Revenue Service mailed its official notice of disallowance of WCL's claim for refund for tax year 2011. The official notice of claim disallowance was attached to the Complaint filed in Docket No. 14-CV-10243, and a true copy is attached hereto as Exhibit 36 (CN000367-371).

56. No portion of the refund claimed by WCL for tax year 2011 has been paid to WCL.

57. The Complaint in Docket No. 14-CV-10243 was timely filed by WCL on December 22, 2014 with respect to tax year 2011, pursuant to I.R.C. § 6532(a), prior to the expiration of two years after the date of mailing of the notice of disallowance.

WCL – 2013 Tax Year

58. On or before February 28, 2014, Plaintiff WCL timely filed Form CT-1, Employer's Annual Railroad Retirement Tax Return, for the taxable year ended December 31, 2013, with the Internal Revenue Service Center, Cincinnati, Ohio 45999. WCL paid the employer and employee taxes shown as due on the return. WCL's 2013 tax return (Form CT-1) was attached to the Complaint filed in Docket No. 14-CV-10243, and a true copy is attached hereto as Exhibit 39 (CN000382-384).

59. On June 16, 2014, by certified mail, within the three-year period provided by I.R.C. § 6511(a), WCL timely filed with the Internal Revenue Service, Cincinnati, Ohio 45999, its claim for

refund (Form CT-1X) of Railroad Retirement taxes paid to the IRS, and withheld from its employees and paid over to the IRS on their behalf, by WCL for the year 2013 in the amount of $8,276.92, plus interest as allowed by law. Such claim for refund was for Railroad Retirement taxes paid by WCL, and withheld by WCL from its employees and paid over, with respect to employees' income in the form of corporate stock on the exercise of nonqualified stock options as described in paragraphs 22-26 above. (Defendant does not stipulate to the correctness of any of the grounds for refund stated in this or any refund claims filed by Plaintiffs in these actions.) WCL's 2013 claim for refund (Form CT-1X) was attached to the Complaint filed in Docket No. 14-CV-10243, and a true copy is attached hereto as Exhibit 40 (CN000385-394).

60. No portion of the refund claimed by WCL for tax year 2013 has been paid to WCL.

61. More than six months had elapsed after WCL's filing of its refund claim for tax year 2013, without any action or decision by the Internal Revenue Service with respect to such claim, when WCL filed its Complaint in Docket No. 14-CV-10243 on December 22, 2014 with respect to tax year 2013. Pursuant to I.R.C. § 6532(a)(1), WCL's Complaint in Docket No. 14-CV-10243 with respect to tax year 2013 was timely filed.

GTW – Tax Year 2006

62. On or before February 28, 2007, Plaintiff GTW timely filed Form CT-1, Employer's Annual Railroad Retirement Tax Return, for the taxa-

ble year ended December 31, 2006, with the Internal Revenue Service Center, Cincinnati, Ohio 45999. GTW paid the employer and employee taxes shown as due on the return. GTW's 2006 tax return (Form CT-1) was attached to the Complaint filed in Docket No. 14-CV-10244, and a true copy is attached hereto as Exhibit 41 (CN000395).

63. On February 26, 2010, by certified mail, within the three-year period provided by I.R.C. § 6511(a), GTW timely filed with the Internal Revenue Service, Cincinnati, Ohio 45999, its claim for refund (Form CT-1X) of Railroad Retirement taxes paid to the IRS, and withheld from its employees and paid over to the IRS on their behalf, by GTW for the year 2006 in the amount of $149,334, plus interest as allowed by law. Such claim for refund was for Railroad Retirement taxes paid by GTW, and withheld by GTW from its employees and paid over, with respect to employees' income in the form of corporate stock on the exercise of nonqualified stock options as described in paragraphs 22-26 above. (Defendant does not stipulate to the correctness of any of the grounds for refund stated in this or any refund claims filed by Plaintiffs in these actions.) GTW's 2006 claim for refund (Form CT-1X) was attached to the Complaint filed in Docket No. 14-CV-10244, and a true copy is attached hereto as Exhibit 42 (CN000396-406).

64. On May 14, 2013, by certified mail, the Internal Revenue Service mailed its official notice of disallowance of GTW's claim for refund for tax year 2006. The official notice of claim disallowance was attached to the Complaint filed in

Docket No. 14-CV-10244, and a true copy is attached hereto as Exhibit 43 (CN000407-408).

65. No portion of the refund claimed by GTW for tax year 2006 has been paid to GTW.

66. The Complaint in Docket No. 14-CV-10244 was timely filed by GTW on December 22, 2014 with respect to tax year 2006, pursuant to I.R.C. § 6532(a), prior to the expiration of two years after the date of mailing of the notice of disallowance.

GTW – 2007 Tax Year

67. On or before February 29, 2008, Plaintiff GTW timely filed Form CT-1, Employer's Annual Railroad Retirement Tax Return, for the taxable year ended December 31, 2007, with the Internal Revenue Service Center, Cincinnati, Ohio 45999. GTW paid the employer and employee taxes shown as due on the return. GTW's 2007 tax return (Form CT-1) was attached to the Complaint filed in Docket No. 14-CV-10244, and a true copy is attached hereto as Exhibit 44 (CN000409-413).

68. On May 12, 2010, by certified mail, within the three-year period provided by I.R.C. § 6511(a), GTW timely filed with the Internal Revenue Service, Cincinnati, Ohio 45999, its claim for refund (Form CT-1X) of Railroad Retirement taxes paid to the IRS, and withheld from its employees and paid over to the IRS on their behalf, by GTW for the year 2007 in the amount of $58,927, plus interest as allowed by law. Such claim for refund was for Railroad Retirement taxes paid by GTW, and withheld by GTW from

its employees and paid over, with respect to employees' income in the form of corporate stock on the exercise of nonqualified stock options as described in paragraphs 22-26 above. (Defendant does not stipulate to the correctness of any of the grounds for refund stated in this or any refund claims filed by Plaintiffs in these actions.) GTW's 2007 claim for refund (Form CT-1X) was attached to the Complaint filed in Docket No. 14-CV-10244, and a true copy is attached hereto as Exhibit 45 (CN000414-422).

69. On May 14, 2013, by certified mail, the Internal Revenue Service mailed its official notice of disallowance of GTW's claim for refund for tax year 2007. The official notice of claim disallowance was attached to the Complaint filed in Docket No. 14-CV-10244, and a true copy is attached hereto as Exhibit 43 (CN000407-408).

70. No portion of the refund claimed by GTW for tax year 2007 has been paid to GTW.

71. The Complaint in Docket No. 14-CV-10244 was timely filed by GTW on December 22, 2014 with respect to tax year 2007, pursuant to I.R.C. § 6532(a), prior to the expiration of two years after the date of mailing of the notice of disallowance.

GTW – 2008 Tax Year

72. On or before March 2, 2009, Plaintiff GTW timely filed Form CT-1, Employer's Annual Railroad Retirement Tax Return, for the taxable year ended December 31, 2008, with the Internal Revenue Service Center, Cincinnati, Ohio 45999. GTW paid the employer and employee taxes shown as due on the return.

GTW's 2008 tax return (Form CT-1) was attached to the Complaint filed in Docket No. 14-CV-10244, and a true copy is attached hereto as Exhibit 46 (CN000423).

73. On May 12, 2010, by certified mail, within the three-year period provided by I.R.C. § 6511(a), GTW timely filed with the Internal Revenue Service, Cincinnati, Ohio 45999, its claim for refund (Form CT-1X) of Railroad Retirement taxes paid to the IRS, and withheld from its employees and paid over to the IRS on their behalf, by GTW for the year 2008 in the amount of $76,103, plus interest as allowed by law. Such claim for refund was for Railroad Retirement taxes paid by GTW, and withheld by GTW from its employees and paid over, with respect to employees' income in the form of corporate stock on the exercise of nonqualified stock options as described in paragraphs 22-26 above. (Defendant does not stipulate to the correctness of any of the grounds for refund stated in this or any refund claims filed by Plaintiffs in these actions.) GTW's 2008 claim for refund (Form CT-1X) was attached to the Complaint filed in Docket No. 14-CV-10244, and a true copy is attached hereto as Exhibit 47 (CN000424-432).

74. On May 14, 2013, by certified mail, the Internal Revenue Service mailed its official notice of disallowance of GTW's claim for refund for tax year 2008. The official notice of claim disallowance was attached to the Complaint filed in Docket No. 14-CV-10244, and a true copy is attached hereto as Exhibit 43 (CN000407-408).

75. No portion of the refund claimed by GTW for tax year 2008 has been paid to GTW.

76. The Complaint in Docket No. 14-CV-10244 was timely filed by GTW on December 22, 2014 with respect to tax year 2008, pursuant to I.R.C. § 6532(a), prior to the expiration of two years after the date of mailing of the notice of disallowance.

GTW – 2009 Tax Year

77. On or before February 28, 2010, Plaintiff GTW timely filed Form CT-1, Employer's Annual Railroad Retirement Tax Return, for the taxable year ended December 31, 2009, with the Internal Revenue Service Center, Cincinnati, Ohio 45999. GTW paid the employer and employee taxes shown as due on the return. GTW's 2009 tax return (Form CT-1) was attached to the Complaint filed in Docket No. 14-CV-10244, and a true copy is attached hereto as Exhibit 48 (CN000433-436).

78. On May 12, 2010, by certified mail, within the three-year period provided by I.R.C. § 6511(a), GTW timely filed with the Internal Revenue Service, Cincinnati, Ohio 45999, its claim for refund (Form CT-1X) of Railroad Retirement taxes paid to the IRS, and withheld from its employees and paid over to the IRS on their behalf, by GTW for the year 2009 in the amount of $57,723, plus interest as allowed by law. Such claim for refund was for Railroad Retirement taxes paid by GTW, and withheld by GTW from its employees and paid over, with respect to employees' income in the form of corporate stock on the exercise of nonqualified stock options as described in paragraphs 22-26 above. (Defendant does not stipulate to the correctness of any of the grounds for refund stated in this or any

refund claims filed by Plaintiffs in these actions.) GTW's 2009 claim for refund (Form CT-1X) was attached to the Complaint filed in Docket No. 14-CV-10244, and a true copy is attached hereto as Exhibit 49 (CN000437-448).

79. On May 14, 2013, by certified mail, the Internal Revenue Service mailed its official notice of disallowance of GTW's claim for refund for tax year 2009. The official notice of claim disallowance was attached to the Complaint filed in Docket No. 14-CV-10244, and a true copy is attached hereto as Exhibit 43 (CN000407-408).

80. No portion of the refund claimed by GTW for tax year 2009 has been paid to GTW.

81. The Complaint in Docket No. 14-CV-10244 was timely filed by GTW on December 22, 2014 with respect to tax year 2009, pursuant to I.R.C. § 6532(a), prior to the expiration of two years after the date of mailing of the notice of disallowance.

GTW – 2010 Tax Year

82. On or before February 28, 2011, Plaintiff GTW timely filed Form CT-1, Employer's Annual Railroad Retirement Tax Return, for the taxable year ended December 31, 2010, with the Internal Revenue Service Center, Cincinnati, Ohio 45999. GTW paid the employer and employee taxes shown as due on the return. GTW's 2010 tax return (Form CT-1) was attached to the Complaint filed in Docket No. 14-CV-10244, and a true copy is attached hereto as Exhibit 50 (CN000449-450).

83. On September 26, 2012, by certified mail, within the three-year period provided by I.R.C.

§ 6511(a), GTW timely filed with the Internal Revenue Service, Cincinnati, Ohio 45999, its claim for refund (Form CT-1X) of Railroad Retirement taxes paid to the IRS, and withheld from its employees and paid over to the IRS on their behalf, by GTW for the year 2010 in the amount of $74,431.07, plus interest as allowed by law. Such claim for refund was for Railroad Retirement taxes paid by GTW, and withheld by GTW from its employees and paid over, with respect to employees' income in the form of corporate stock on the exercise of nonqualified stock options as described in paragraphs 22-26 above. (Defendant does not stipulate to the correctness of any of the grounds for refund stated in this or any refund claims filed by Plaintiffs in these actions.) GTW's 2010 claim for refund (Form CT-1X) was attached to the Complaint filed in Docket No. 14-CV-10244, and a true copy is attached hereto as Exhibit 51 (CN000451-459).

84. On December 27, 2012, by certified mail, the Internal Revenue Service mailed its official notice of disallowance of GTW's claim for refund for tax year 2010. The official notice of claim disallowance was attached to the Complaint filed in Docket No. 14-CV-10244, and a true copy is attached hereto as Exhibit 52 (CN000460-464).

85. No portion of the refund claimed by GTW for tax year 2010 has been paid to GTW.

86. The Complaint in Docket No. 14-CV-10244 was timely filed by GTW on December 22, 2014 with respect to tax year 2010, pursuant to I.R.C. §

6532(a), prior to the expiration of two years after the date of mailing of the notice of disallowance.

GTW – 2011 Tax Year

87. On or before February 29, 2012, Plaintiff GTW timely filed Form CT-1, Employer's Annual Railroad Retirement Tax Return, for the taxable year ended December 31, 2011, with the Internal Revenue Service Center, Cincinnati, Ohio 45999. GTW paid the employer and employee taxes shown as due on the return. GTW's 2011 tax return (Form CT-1) was attached to the Complaint filed in Docket No. 14-CV-10244, and a true copy is attached hereto as Exhibit 53 (CN000465).

88. On September 26, 2012, by certified mail, within the three-year period provided by I.R.C. § 6511(a), GTW timely filed with the Internal Revenue Service, Cincinnati, Ohio 45999, its claim for refund (Form CT-1X) of Railroad Retirement taxes paid to the IRS, and withheld from its employees and paid over to the IRS on their behalf, by GTW for the year 2011 in the amount of $48,718.69, plus interest as allowed by law. Such claim for refund was for Railroad Retirement taxes paid by GTW, and withheld by GTW from its employees and paid over, with respect to employees' income in the form of corporate stock on the exercise of nonqualified stock options as described in paragraphs 22-26 above. (Defendant does not stipulate to the correctness of any of the grounds for refund stated in this or any refund claims filed by Plaintiffs in these actions.) GTW's 2011 claim for refund (Form CT-1X) was attached to the Complaint

filed in Docket No. 14-CV-10244, and a true copy is attached hereto as Exhibit 54 (CN000466-474).

89. On December 27, 2012, by certified mail, the Internal Revenue Service mailed its official notice of disallowance of GTW's claim for refund for tax year 2011. The official notice of claim disallowance was attached to the Complaint filed in Docket No. 14-CV-10244, and a true copy is attached hereto as Exhibit 52 (CN000460-464).

90. No portion of the refund claimed by GTW for tax year 2011 has been paid to GTW.

91. The Complaint in Docket No. 14-CV-10244 was timely filed by GTW on December 22, 2014 with respect to tax year 2011, pursuant to I.R.C. § 6532(a), prior to the expiration of two years after the date of mailing of the notice of disallowance.

GTW – 2012 Tax Year

92. On or before February 28, 2013, Plaintiff GTW timely filed Form CT-1, Employer's Annual Railroad Retirement Tax Return, for the taxable year ended December 31, 2012, with the Internal Revenue Service Center, Cincinnati, Ohio 45999. GTW paid the employer and employee taxes shown as due on the return. GTW's 2012 tax return (Form CT-1) was attached to the Complaint filed in Docket No. 14-CV-10244, and a true copy is attached hereto as Exhibit 55 (CN000475-478).

93. On June 16, 2014, by certified mail, within the three-year period provided by I.R.C. § 6511(a), GTW timely filed with the Internal Revenue Service, Cincinnati, Ohio 45999, its claim for

refund (Form CT-1X) of Railroad Retirement taxes paid to the IRS, and withheld from its employees and paid over to the IRS on their behalf, by GTW for the year 2012 in the amount of $52,352.82, plus interest as allowed by law. Such claim for refund was for Railroad Retirement taxes paid by GTW, and withheld by GTW from its employees and paid over, with respect to employees' income in the form of corporate stock on the exercise of nonqualified stock options as described in paragraphs 22-26 above. (Defendant does not stipulate to the correctness of any of the grounds for refund stated in this or any refund claims filed by Plaintiffs in these actions.) GTW's 2012 claim for refund (Form CT-1X) was attached to the Complaint filed in Docket No. 14-CV-10244, and a true copy is attached hereto as Exhibit 56 (CN000479-485).

94. No portion of the refund claimed by GTW for tax year 2012 has been paid to GTW.

95. More than six months had elapsed after GTW's filing of its refund claim for tax year 2012, without any action or decision by the Internal Revenue Service with respect to such claim, when GTW filed its Complaint in Docket No. 14-CV-10244 on December 22, 2014 with respect to tax year 2012. Pursuant to I.R.C. § 6532(a)(1), GTW's Complaint in Docket No. 14-CV-10244 with respect to tax year 2012 was timely filed.

ICRR – Tax Year 2006

96. On or before February 28, 2007, Plaintiff ICRR timely filed Form CT-1, Employer's Annual Railroad Retirement Tax Return, for the taxa-

ble year ended December 31, 2006, with the Internal Revenue Service Center, Cincinnati, Ohio 45999. ICRR paid the employer and employee taxes shown as due on the return. ICRR's 2006 tax return (Form CT-1) was attached to the Complaint filed in Docket No. 14-CV-10246, and a true copy is attached hereto as Exhibit 57 (CN000486-489).

97. On February 26, 2010, by certified mail, within the three-year period provided by I.R.C. § 6511(a), ICRR timely filed with the Internal Revenue Service, Cincinnati, Ohio 45999, its claim for refund (Form CT-1X) of Railroad Retirement taxes paid to the IRS, and withheld from its employees and paid over to the IRS on their behalf, by ICRR for the year 2006 in the amount of $1,794,480, plus interest as allowed by law. Such claim for refund was for Railroad Retirement taxes paid by ICRR, and withheld by ICRR from its employees and paid over, with respect to employees' income in the form of corporate stock on the exercise of nonqualified stock options as described in paragraphs 22-26 above. (Defendant does not stipulate to the correctness of any of the grounds for refund stated in this or any refund claims filed by Plaintiffs in these actions.) ICRR's 2006 claim for refund (Form CT-1X) was attached to the Complaint filed in Docket No. 14-CV-10246, and a true copy is attached hereto as Exhibit 58 (CN000490-500).

98. On May 14, 2013, by certified mail, the Internal Revenue Service mailed its official notice of disallowance of ICRR's claim for refund for tax

year 2006. The official notice of claim disallowance was attached to the Complaint filed in Docket No. 14-CV-10246, and a true copy is attached hereto as Exhibit 59 (CN000501-502).

99. No portion of the refund claimed by ICRR for tax year 2006 has been paid to ICRR.

100. The Complaint in Docket No. 14-CV-10246 was timely filed by ICRR on December 22, 2014 with respect to tax year 2006, pursuant to I.R.C. § 6532(a), prior to the expiration of two years after the date of mailing of the notice of disallowance.

ICRR – Tax Year 2007

101. On or before February 29, 2008, Plaintiff ICRR timely filed Form CT-1, Employer's Annual Railroad Retirement Tax Return, for the taxable year ended December 31, 2007, with the Internal Revenue Service Center, Cincinnati, Ohio 45999. ICRR paid the employer and employee taxes shown as due on the return. ICRR's 2007 tax return (Form CT-1) was attached to the Complaint filed in Docket No. 14-CV-10246, and a true copy is attached hereto as Exhibit 60 (CN000503-507).

102. On May 12, 2010, by certified mail, within the three-year period provided by I.R.C. § 6511(a), ICRR timely filed with the Internal Revenue Service, Cincinnati, Ohio 45999, its claim for refund (Form CT-1X) of Railroad Retirement taxes paid to the IRS, and withheld from its employees and paid over to the IRS on their behalf, by ICRR for the year 2007 in the amount of $1,085,711, plus interest as allowed by law.

Such claim for refund was for Railroad Retirement taxes paid by ICRR, and withheld by ICRR from its employees and paid over, with respect to employees' income in the form of corporate stock on the exercise of nonqualified stock options as described in paragraphs 22-26 above. (Defendant does not stipulate to the correctness of any of the grounds for refund stated in this or any refund claims filed by Plaintiffs in these actions.) ICRR's 2007 claim for refund (Form CT-1X) was attached to the Complaint filed in Docket No. 14-CV-10246, and a true copy is attached hereto as Exhibit 61 (CN000508-517).

103. On May 14, 2013, by certified mail, the Internal Revenue Service mailed its official notice of disallowance of ICRR's claim for refund for tax year 2007. The official notice of claim disallowance was attached to the Complaint filed in Docket No. 14-CV-10246, and a true copy is attached hereto as Exhibit 59 (CN000501-502).

104. No portion of the refund claimed by ICRR for tax year 2007 has been paid to ICRR.

105. The Complaint in Docket No. 14-CV-10246 was timely filed by ICRR on December 22, 2014 with respect to tax year 2007, pursuant to I.R.C. § 6532(a), prior to the expiration of two years after the date of mailing of the notice of disallowance.

ICRR – Tax Year 2008

106. On or before March 2, 2009, Plaintiff ICRR timely filed Form CT-1, Employer's Annual Railroad Retirement Tax Return, for the taxa-

ble year ended December 31, 2008, with the Internal Revenue Service Center, Cincinnati, Ohio 45999. ICRR paid the employer and employee taxes shown as due on the return. ICRR's 2008 tax return (Form CT-1) was attached to the Complaint filed in Docket No. 14-CV-10246, and a true copy is attached hereto as Exhibit 62 (CN000518).

107. On May 12, 2010, by certified mail, within the three-year period provided by I.R.C. § 6511(a), ICRR timely filed with the Internal Revenue Service, Cincinnati, Ohio 45999, its claim for refund (Form CT-1X) of Railroad Retirement taxes paid to the IRS, and withheld from its employees and paid over to the IRS on their behalf, by ICRR for the year 2008 in the amount of $1,219,406, plus interest as allowed by law. Such claim for refund was for Railroad Retirement taxes paid by ICRR, and withheld by ICRR from its employees and paid over, with respect to employees' income in the form of corporate stock on the exercise of nonqualified stock options as described in paragraphs 22-26 above. (Defendant does not stipulate to the correctness of any of the grounds for refund stated in this or any refund claims filed by Plaintiffs in these actions.) ICRR's 2008 claim for refund (Form CT-1X) was attached to the Complaint filed in Docket No. 14-CV-10246, and a true copy is attached hereto as Exhibit 63 (CN000519-529).

108. On May 14, 2013, by certified mail, the Internal Revenue Service mailed its official notice of disallowance of ICRR's claim for refund for tax

year 2008. The official notice of claim disallowance was attached to the Complaint filed in Docket No. 14-CV-10246, and a true copy is attached hereto as Exhibit 59 (CN000501-502).

109. No portion of the refund claimed by ICRR for tax year 2008 has been paid to ICRR.

110. The Complaint in Docket No. 14-CV-10246 was timely filed by ICRR on December 22, 2014 with respect to tax year 2008, pursuant to I.R.C. § 6532(a), prior to the expiration of two years after the date of mailing of the notice of disallowance.

ICRR – Tax Year 2009

111. On or before March 1, 2010, Plaintiff ICRR timely filed Form CT-1, Employer's Annual Railroad Retirement Tax Return, for the taxable year ended December 31, 2009, with the Internal Revenue Service Center, Cincinnati, Ohio 45999. ICRR paid the employer and employee taxes shown as due on the return. ICRR's 2009 tax return (Form CT-1) was attached to the Complaint filed in Docket No. 14-CV-10246, and a true copy is attached hereto as Exhibit 64 (CN000530-533).

112. On May 12, 2010, by certified mail, within the three-year period provided by I.R.C. § 6511(a), ICRR timely filed with the Internal Revenue Service, Cincinnati, Ohio 45999, its claim for refund (Form CT-1X) of Railroad Retirement taxes paid to the IRS, and withheld from its employees and paid over to the IRS on their behalf, by ICRR for the year 2009 in the amount of $1,535,983, plus interest as allowed by law.

Such claim for refund was for Railroad Retirement taxes paid by ICRR, and withheld by ICRR from its employees and paid over, with respect to employees' income in the form of corporate stock on the exercise of nonqualified stock options as described in paragraphs 22-26 above. (Defendant does not stipulate to the correctness of any of the grounds for refund stated in this or any refund claims filed by Plaintiffs in these actions.) ICRR's 2009 claim for refund (Form CT-1X) was attached to the Complaint filed in Docket No. 14-CV-10246, and a true copy is attached hereto as Exhibit 65 (CN000534-547).

113. On May 14, 2013, by certified mail, the Internal Revenue Service mailed its official notice of disallowance of ICRR's claim for refund for tax year 2009. The official notice of claim disallowance was attached to the Complaint filed in Docket No. 14-CV-10246, and a true copy is attached hereto as Exhibit 59 (CN000501-502).

114. No portion of the refund claimed by ICRR for tax year 2009 has been paid to ICRR.

115. The Complaint in Docket No. 14-CV-10246 was timely filed by ICRR on December 22, 2014 with respect to tax year 2009, pursuant to I.R.C. § 6532(a), prior to the expiration of two years after the date of mailing of the notice of disallowance.

ICRR – Tax Year 2010

116. On or before February 28, 2011, Plaintiff ICRR timely filed Form CT-1, Employer's Annual Railroad Retirement Tax Return, for the taxa-

ble year ended December 31, 2010, with the Internal Revenue Service Center, Cincinnati, Ohio 45999. ICRR paid the employer and employee taxes shown as due on the return. ICRR's 2010 tax return (Form CT-1) was attached to the Complaint filed in Docket No. 14-CV-10246, and a true copy is attached hereto as Exhibit 66 (CN000548-549).

117. On September 26, 2012, by certified mail, within the three-year period provided by I.R.C. § 6511(a), ICRR timely filed with the Internal Revenue Service, Cincinnati, Ohio 45999, its claim for refund (Form CT-1X) of Railroad Retirement taxes paid to the IRS, and withheld from its employees and paid over to the IRS on their behalf, by ICRR for the year 2010 in the amount of $2,353,619.16, plus interest as allowed by law. Such claim for refund was for Railroad Retirement taxes paid by ICRR, and withheld by ICRR from its employees and paid over, with respect to employees' income in the form of corporate stock on the exercise of non-qualified stock options as described in paragraphs 22-26 above. (Defendant does not stipulate to the correctness of any of the grounds for refund stated in this or any refund claims filed by Plaintiffs in these actions.) ICRR's 2010 claim for refund (Form CT-1X) was attached to the Complaint filed in Docket No. 14-CV-10246, and a true copy is attached hereto as Exhibit 67 (CN000550-557).

118. On December 27, 2012, by certified mail, the Internal Revenue Service mailed its official notice of disallowance of ICRR's claim for refund for

tax year 2010. The official notice of claim disallowance was attached to the Complaint filed in Docket No. 14-CV-10246, and a true copy is attached hereto as Exhibit 68 (CN000558-562).

119. No portion of the refund claimed by ICRR for tax year 2010 has been paid to ICRR.

120. The Complaint in Docket No. 14-CV-10246 was timely filed by ICRR on December 22, 2014 with respect to tax year 2010, pursuant to I.R.C. § 6532(a), prior to the expiration of two years after the date of mailing of the notice of disallowance.

ICRR – Tax Year 2011

121. On or before February 29, 2012, Plaintiff ICRR timely filed Form CT-1, Employer's Annual Railroad Retirement Tax Return, for the taxable year ended December 31, 2011, with the Internal Revenue Service Center, Cincinnati, Ohio 45999. ICRR paid the employer and employee taxes shown as due on the return. ICRR's 2011 tax return (Form CT-1) was attached to the Complaint filed in Docket No. 14-CV-10246, and a true copy is attached hereto as Exhibit 69 (CN000563).

122. On September 26, 2012, by certified mail, within the three-year period provided by I.R.C. § 6511(a), ICRR timely filed with the Internal Revenue Service, Cincinnati, Ohio 45999, its claim for refund (Form CT-1X) of Railroad Retirement taxes paid to the IRS, and withheld from its employees and paid over to the IRS on their behalf, by ICRR for the year 2011 in the amount of $1,482,491.29, plus interest as allowed by law. Such claim for refund was for

Railroad Retirement taxes paid by ICRR, and withheld by ICRR from its employees and paid over, with respect to employees' income in the form of corporate stock on the exercise of non-qualified stock options as described in paragraphs 22-26 above. (Defendant does not stipulate to the correctness of any of the grounds for refund stated in this or any refund claims filed by Plaintiffs in these actions.) ICRR's 2011 claim for refund (Form CT-1X) was attached to the Complaint filed in Docket No. 14-CV-10246, and a true copy is attached hereto as Exhibit 70 (CN000564-571).

123. On December 27, 2012, by certified mail, the Internal Revenue Service mailed its official notice of disallowance of ICRR's claim for refund for tax year 2011. The official notice of claim disallowance was attached to the Complaint filed in Docket No. 14-CV-10246, and a true copy is attached hereto as Exhibit 68 (CN000558-562).

124. No portion of the refund claimed by ICRR for tax year 2011 has been paid to ICRR.

125. The Complaint in Docket No. 14-CV-10246 was timely filed by ICRR on December 22, 2014 with respect to tax year 2011, pursuant to I.R.C. § 6532(a), prior to the expiration of two years after the date of mailing of the notice of disallowance.

ICRR – Tax Year 2012

126. On or before February 28, 2013, Plaintiff ICRR timely filed Form CT-1, Employer's Annual Railroad Retirement Tax Return, for the taxable year ended December 31, 2012, with the Internal Revenue Service Center, Cincinnati,

Ohio 45999. ICRR paid the employer and employee taxes shown as due on the return. ICRR's 2012 tax return (Form CT-1) was attached to the Complaint filed in Docket No. 14-CV-10246, and a true copy is attached hereto as Exhibit 71 (CN000572-574).

127. On June 16, 2014, by certified mail, within the three-year period provided by I.R.C. § 6511(a), ICRR timely filed with the Internal Revenue Service, Cincinnati, Ohio 45999, its claim for refund (Form CT-1X) of Railroad Retirement taxes paid to the IRS, and withheld from its employees and paid over to the IRS on their behalf, by ICRR for the year 2012 in the amount of $2,731,670.19, plus interest as allowed by law. Such claim for refund was for Railroad Retirement taxes paid by ICRR, and withheld by ICRR from its employees and paid over, with respect to employees' income in the form of corporate stock on the exercise of nonqualified stock options as described in paragraphs 22-26 above. (Defendant does not stipulate to the correctness of any of the grounds for refund stated in this or any refund claims filed by Plaintiffs in these actions.) ICRR's 2012 claim for refund (Form CT-1X) was attached to the Complaint filed in Docket No. 14-CV-10246, and a true copy is attached hereto as Exhibit 72 (CN000575-585).

128. No portion of the refund claimed by ICRR for tax year 2012 has been paid to ICRR.

129. More than six months had elapsed after ICRR's filing of its refund claim for tax year 2012, without any action or decision by the Internal Revenue Service with respect to such claim, when

ICRR filed its Complaint in Docket No. 14-CV-10246 on December 22, 2014 with respect to tax year 2012. Pursuant to I.R.C. § 6532(a)(1), ICRR's Complaint in Docket No. 14-CV-10246 with respect to tax year 2012 was timely filed.

ICRR – Tax Year 2013

130. On or before February 28, 2014, Plaintiff ICRR timely filed Form CT-1, Employer's Annual Railroad Retirement Tax Return, for the taxable year ended December 31, 2013, with the Internal Revenue Service Center, Cincinnati, Ohio 45999. ICRR paid the employer and employee taxes shown as due on the return. ICRR's 2013 tax return (Form CT-1) was attached to the Complaint filed in Docket No. 14-CV-10246, and a true copy is attached hereto as Exhibit 73 (CN000586-588).

131. On June 16, 2014, by certified mail, within the three-year period provided by I.R.C. § 6511(a), ICRR timely filed with the Internal Revenue Service, Cincinnati, Ohio 45999, its claim for refund (Form CT-1X) of Railroad Retirement taxes paid to the IRS, and withheld from its employees and paid over to the IRS on their behalf, by ICRR for the year 2013 in the amount of $397,598.18, plus interest as allowed by law. Such claim for refund was for Railroad Retirement taxes paid by ICRR, and withheld by ICRR from its employees and paid over, with respect to employees' income in the form of corporate stock on the exercise of nonqualified stock options as described in paragraphs 22-26 above. (Defendant does not stipulate to the correctness of any of the grounds for refund stated in this or any refund claims filed by Plaintiffs

in these actions.) ICRR's 2013 claim for refund (Form CT-1X) was attached to the Complaint filed in Docket No. 14-CV-10246, and a true copy is attached hereto as Exhibit 74 (CN000589-598).

132. No portion of the refund claimed by ICRR for tax year 2013 has been paid to ICRR.

133. More than six months had elapsed after ICRR's filing of its refund claim for tax year 2013, without any action or decision by the Internal Revenue Service with respect to such claim, when ICRR filed its Complaint in Docket No. 14-CV-10246 on December 22, 2014 with respect to tax year 2013. Pursuant to I.R.C. § 6532(a)(1), ICRR's Complaint in Docket No. 14-CV-10246 with respect to tax year 2013 was timely filed.

# # #

Stipulated as of this 27th day of October, 2015.

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No. 17-530

IN THE

Supreme Court of the United States

WISCONSIN CENTRAL LTD.; GRAND TRUNK WESTERN RAILROAD COMPANY; AND ILLINOIS CENTRAL RAILROAD COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether stock that a railroad transfers to its employees is taxable under the Railroad Retirement Tax Act, 26 U.S.C. § 3231(e)(1).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel states that petitioners Wisconsin Central Ltd., Grand Trunk Western Railroad Company, and Illinois Central Railroad Company are all indirect wholly-owned subsidiaries of Canadian National Railway Company, a publicly-traded corporation.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The Seventh Circuit's opinion (Pet. App. 1a) is reported at 856 F.3d 490. The Seventh Circuit's order denying rehearing or rehearing en banc (Pet. App. 14a) is not reported. The order and opinion of the district court granting summary judgment (Pet. App. 16a) is reported at 194 F. Supp. 3d 728.

JURISDICTION

The Seventh Circuit entered its judgment on May 8, 2017, and denied petitioners' timely petition for rehearing or rehearing en banc on July 12, 2017. The petition for a writ of certiorari was filed on October 6, 2017, and granted on January 12, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Railroad Retirement Tax Act, 26 U.S.C. § 3231(e)(1), provides, in relevant part:

> **(e) Compensation**—For purposes of this chapter—
>
> > **(1)** The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers.

Section 3231(e) is reproduced in full at the back of this brief, Add. 1a, as are relevant provisions of the Federal Insurance Contributions Act, 26 U.S.C. § 3121(a), Add. 8a.

STATEMENT

This case presents the question whether the transfer of corporate stock by a railroad to its employees constitutes "money remuneration" under the Railroad Retirement Tax Act (RRTA), 26 U.S.C. § 3201 et seq.

The RRTA imposes a payroll tax on both railroad employers and employees, with the proceeds used to pay retirement and disability benefits. The RRTA taxes "compensation," which it defines as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. § 3231(e)(1).

Petitioners are railroads that issued stock options to their employees. When the employees exercised the options and received the stock, petitioners paid RRTA taxes, but sought refunds on the basis that the stock was not "money remuneration" and hence was not taxable. The IRS denied the refunds and a divided Seventh Circuit panel sided with the government. The court appeared to recognize that the word "money" refers to mediums of exchange, and that stock may not have been considered money when the RRTA was enacted in 1937. Pet. App. 4a. But it then asserted, without citing any legal or economic authority to support the point, that today stock has become the "practical equivalent" of money and therefore is taxable as "money remuneration." *Id.*

The Seventh Circuit departed from traditional methods of statutory interpretation and reached an incorrect conclusion. This is a plain-language case that can and should be resolved based on the text of the statute: Stock is not money. Whereas stock can

be bought and sold for money, it is not a generally accepted medium of exchange—and therefore is not money itself. That common-sense conclusion is confirmed by considering the RRTA's "money remuneration" standard in light of the tax code as a whole. The 1939 version of the Internal Revenue Code—which treated money and stock as different things—is a powerful indicator that when Congress used the phrase "money remuneration" in the RRTA, it intended to confine the RRTA's tax base to remuneration in cash or an equivalent medium of exchange.

That understanding is also consistent with the RRTA's historical context and purpose. Whereas most employers pay and withhold taxes under the Federal Insurance Contributions Act (FICA), Congress from the beginning has exempted railroads and railroad employees from FICA, and instead made them subject to the RRTA. The same Depression-era Congress that enacted the RRTA enacted FICA. But Congress established very different tax bases for the two statutes. Whereas the RRTA taxes "compensation," which it defines as "money remuneration," FICA taxes "wages," which it defines as "*all* remuneration for employment, including the cash value of all remuneration (including benefits) *paid in any medium other than cash*." 26 U.S.C. § 3121(a) (emphasis added).

The difference in language reflects the congressional purpose that, in creating a railroad retirement system separate and distinct from the Social Security/FICA system that governs other employers, Congress intended to tax only a *subset* of the total remuneration railroad employees received. That approach was consistent with the practice that

had long existed in the industry. Since the nineteenth century, railroads had provided their employees with pensions based on salary, not stock. By mirroring the pension structure that existed at the time of the Great Depression, the RRTA enabled a smooth transition from a private pension system to a government-sponsored one.

The Eighth Circuit recently decided the very question presented here. Based on a careful examination of the statute's text, structure and purpose, the court held that stock transfers do not constitute "money remuneration" under the RRTA. *See Union Pacific R.R. Co. v. United States*, 865 F.3d 1045 (8th Cir. 2017).

This Court should confirm what the statutory text and common sense make clear—because money refers to a medium of exchange, stock is not money—and reverse the judgment below.

A. The Railroad Retirement Tax Act

1. Railroads have played a unique role in American history. From the first track laid in 1830 near Baltimore, to the golden spike of 1869 that connected the eastern and western rail systems to form a transcontinental rail network, railroads shaped the development and destiny of our nation. *See generally* John W. Wood, The Historical Atlas of North American Railroads (2007).

By the beginning of the twentieth century, railroads had assumed a dominant position in American industry and employed more than one million workers throughout the nation. Railroads typically paid their workers a base salary on a monthly or annual basis. *See* 1 Murray Latimer, Industrial Pension Systems in the United States and

Canada, at 20 (1933). In addition, they often provided in-kind benefits, including meals, transportation, and lodging. Some railroads also gave their employees company stock, or the opportunity to buy company stock. *See* Nat'l Indus. Conf. Bd., *Employee Stock Purchase Plans in the United States* 81, 208 (1928).

In addition to these various forms of remuneration, railroads provided their employees with pensions. In this regard, as in many others, the railroads were pioneers. They were among the first American industries to ensure their employees' retirement security by providing annuities to employees who had reached a specified age with a specified length of service. *See* Latimer at 20.

The nuances of individual pensions differed by the employing railroad. But as a general matter, whereas railroad employees received remuneration in a variety of ways—including their base salary, a bonus, and in-kind benefits ranging from food and lodging to company stock and other non-monetary property—the amount of the annuity was typically based on the employee's regular paycheck earnings over the course of his or her career. *See* Latimer at 20 (pensions based on workers' "salaries"); *id.* at 21 (railroad pensions measured by "average annual pay"); *id.* at 22-35, 106-12, 133-38; Patrick W. Seburn, *Evolution of Employer-Provided Defined Benefit Pensions*, Monthly Labor Review 17 (Dec. 1991) (pensions based on workers' "average salary over a specific period"); The Atchison, Topeka and Santa Fe Pension System, Railway Age, at 15 (Jan. 4, 1907) (explaining that railroad pensions are calculated with respect to "average monthly pay").

Basing pensions on the employee's regular pay ensured both fairness and ease of administration. Regular pay yielded predictable amounts of post-

retirement pensions. *See* House Report No. 1071, 75th Cong., 1st Sess. at 3 (June 21, 1937) (estimating future RRTA tax revenue based on the reported "pay roll" of railroad employers); Senate Report No. 818, 75th Cong., 1st Sess. at 3 (June 15, 1937) (same). By contrast, pension payments did not reflect irregularly-provided in-kind benefits, or any purchases of company stock, which could be difficult to calculate and lead to disputes over valuation. *See* Latimer at 102 ("In determining the amount of pension to which a retiring worker will be entitled, the establishment of fixed standards is as important as in setting up the conditions for retirement; only in this way can discrimination be avoided, the procedure be routinized and cost be calculated.").

2. By the late 1920s, more than 80 percent of railroad employees worked for railroads with existing pension plans. Kevin Whitman, *An Overview of the Railroad Retirement Program*, 68 Soc. Sec. Bull. 41, 41 (2008). But the railroads were struggling to meet their pension obligations, and as the 1930s dawned, "the Great Depression drove the already unstable railroad pension system into a state of crisis." *Id.*

The crisis was not confined to the railroad industry. Millions of Americans, particularly older workers approaching retirement or who had already retired, faced an uncertain future. Aiming to ensure that American workers enjoyed a stable and secure retirement, Congress took action to create a federal pension system. But rather than enact a single system, Congress proceeded on two separate tracks. It enacted the Social Security Act, which provided retirement benefits funded by a payroll tax through the statute that came to be known as FICA. *See* Pub. L. No. 271, 74th Cong., 1st Sess. § 811(a), 49 Stat. 620

(1935). And it enacted a separate, railroad-only statute that provided retirement benefits funded by a payroll tax through the statute that came to be known as the RRTA. *See* 50 Stat. 435.[1] Because railroads had a separate retirement system, Congress exempted railroads from the Social Security system. *See* 50 Stat. at 439-40; 26 U.S.C. § 3121(b)(9).

Congress created a separate railroad retirement system for several reasons. First, the planned Social Security system would not cover work performed before 1937, so it would provide no relief for the many railroad workers with accrued pension rights that were in jeopardy. *See* Whitman at 41. Second, Social Security was not scheduled to begin paying benefits for years, so it would not help the railroad workers in need of immediate relief. *Id.*

The decision to create distinct retirement systems was consistent with Congress' historic practice of enacting railroad-specific legislation reflecting the railroads' unique role in our nation's history and economy. In 1908, for example, Congress had enacted the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, to govern employee injury claims against railroads. And in 1926, it had enacted the Railway Labor Act, 45 U.S.C. §§ 151-162, to govern labor relations in the railroad industry.

Congress' effort to create a railroad retirement system got off to a rocky start. Its first attempt, *see* 48 Stat. 1283, was promptly struck down as unconstitutional. *See R.R. Ret. Bd. v. Alton R.R. Co.*,

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[1] The RRTA was originally known as the Carriers Taxing Act; it was renamed the RRTA in 1946. *See* 60 Stat. 722. FICA, originally enacted as Title VIII of the Social Security Act, was transferred in 1939 to the Internal Revenue Code. *See* 53 Stat. 1387.

295 U.S. 330 (1935). Its second attempt, *see* 49 Stat. 967, met a similar fate. *See Alton R.R. Co. v. R.R. Ret. Bd.*, 16 F. Supp. 955 (D.D.C. 1936).

Congress made a third attempt—this time through legislation reflecting a negotiated compromise between railroad labor and management. *See* 50 Stat. 307 (1937); 50 Stat. 435 (1937). Perhaps to increase its chances of survival under the scrutiny of a judiciary that at the time was skeptical of new federal mandates that exceeded the terms of private contracts, the RRTA mirrored the existing pension arrangements in the railroad industry. Railroad pensions were based on an employee's regular pay, rather than on all the different types of remuneration the employee received. *See* Latimer at 20-21.

This version of the RRTA survived. Nearly 50,000 existing railroad pensioners were immediately transferred into the railroad retirement system and began receiving federal pensions, *see* Whitman at 42; Railroad Retirement Handbook at 2, while many more active railroad workers would become eligible for benefits upon their retirement.

3. The RRTA levies a tax on employee "compensation." Although Congress has amended the statute over the years, it has kept in place the original statutory definition of "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." Those words appear in the United States Code today unchanged from the statute's original text. *See* 50 Stat. 435, 436; 26 U.S.C. § 3231(e)(1). Railroad employers must pay an excise tax equal to a specified percentage of their employees' "compensation," and also withhold a specified percentage of that compensation as the employees' share of the tax. *See*

26 U.S.C. § 3201(a)-(b) (tax on railroad employees); *id.* § 3221(a)-(b) (tax on railroad employers).

The railroad retirement system differs from the Social Security/FICA retirement system in key respects. For one thing, the tax bases are very different. Whereas the RRTA taxes employee "compensation," defined as "money remuneration," FICA taxes "wages," defined as "all remuneration . . . including the cash value of all remuneration (including benefits) paid in any medium other than cash." *See* 26 U.S.C. § 3231(e)(1) (RRTA); *id.* § 3121(a) (FICA).

The benefits provided by the two retirement systems differ as well. Railroad workers have always enjoyed more robust benefits, including larger monthly payments, more generous disability pay and a lower retirement age, among other things. In 1974, the railroad retirement system was changed to address the unfairness of some retirees (who had worked for both a railroad and a non-railroad employer) receiving dual benefits under the railroad retirement program *and* Social Security. *See* Alfred M. Skolnik, *Restructuring the Railroad Retirement System*, 38 Soc. Sec. Bull. 23, 26-27 (Apr. 1975). But rather than abolish the railroad retirement program and put all retirees into Social Security, Congress maintained railroad retirement as a separate program and created two "tiers" of railroad benefits, both linked to the amount of employee "compensation." *See Hisquierdo v. Hisquierdo*, 439 U.S. 572, 574-75 (1979). Under the new scheme, Tier 1 benefits are generally analogous to Social Security benefits. *See* 45 U.S.C. § 231b(a). Tier 2 benefits, which are the benefits provided by the original version of the statute, have no Social Security analogue; these

benefits are generally comparable to a private pension system based on earnings and career service. *See* 45 U.S.C. § 231b(b).[2]

Over the years, Congress has added various exemptions to RRTA "compensation." *See* 26 U.S.C. § 3231(e)(1)-(12). In 2004, Congress added an exemption for "[q]ualified stock options." *Id.* § 3231(e)(12). The new language provided that "[t]he term 'compensation' shall not include any remuneration on account of a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b)), or any disposition by the individual of such stock." *Id.* (internal numbering omitted). The need for this amendment arose because of confusion about whether employers had to withhold employment taxes in connection with employees' exercise of "incentive stock options"—a particular type of option that receives favorable treatment under the tax code. *See* Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in the 108th Congress* at 218-19 (May 2005). Accordingly, Congress inserted into FICA an exemption for these options—and placed the same exemption in three other federal employment tax statutes, including the RRTA. *See* 118 Stat. 1418 (2004).

Throughout the 80-plus years since their enactment, Congress has maintained the distinction between the RRTA and FICA. Although legislation that would have conformed RRTA "compensation" to FICA "wages" has been introduced, *see* 138 Cong. Rec.

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[2] Railroad retirement benefits are provided under the Railroad Retirement Act, which was enacted simultaneously with the RRTA. *See* 50 Stat. 307, now codified at 45 U.S.C. §§ 231-231v.

S1362-02, S1474 (Feb. 7, 1992), Congress has rejected that change and preserved railroad retirement as a separate and distinct system.

B. The IRS's Shifting Interpretation

The government's understanding of "money remuneration" has evolved.

Soon after the RRTA's enactment, the IRS (then the Bureau of Internal Revenue) issued a regulation interpreting the word "compensation" to include "all remuneration in money, or in something which may be used in lieu of money (scrip and merchandise orders, for example), which is earned by an individual for services performed as an employee for one or more employers, or as an employee representative." 26 C.F.R. § 410.5 (1938). The regulation further provided that "compensation" includes "[s]alaries, wages, commissions, fees, bonuses, and any other remuneration in money or in something which may be used in lieu of money." *Id.* § 410.6(a).

The IRS's original regulation remained on the books until 1994. That year the IRS issued a new regulation to achieve what it characterized as "the congressional goal of making the [FICA and RRTA] systems parallel." Internal Revenue Service, *Update of Railroad Retirement Tax Act Regulations*, 58 Fed. Reg. 28,366, 28,367 (May 13, 1993). The new regulation—which remains on the books today—provides that RRTA "compensation" has "the same meaning as the term wages in section 3121(a) [the FICA definition of "wages"], determined without regard to section 3121(b)(9) [the provision exempting railroads from FICA taxation], *except as specifically limited by the Railroad Retirement Tax Act* . . . or

regulation." 26 C.F.R. § 31.3231(e)-1(a)(1) (emphasis added).

C. Petitioners' Stock Option Plan

The three petitioners—Wisconsin Central Ltd., Grand Trunk Western Railroad Company, and Illinois Central Railroad Company—are subsidiaries of Canadian National Railway Company (CN) with significant operations in the midwestern United States and the Mississippi Valley. All are rail carriers subject to the RRTA. JA 36.

Petitioners have issued stock options to their employees since the mid-1990s. JA 45. Each option gave the employee the right to purchase one share of CN stock at a fixed exercise price—the "strike" price—equal to CN's publicly traded stock price as of the date the option was granted. JA 41. Thus, the value of an option—unlike the value of a cash salary—depends on the future performance of the company, as reflected in its publicly-traded share price, which may increase or decrease once the option is granted. JA 46.

Petitioners issued stock options because stock options incentivize employees in a way that money payments do not. JA 45-47. Stock options "encourage[] employees to work harder for the company, because the better the company does the more valuable its stock is." Pet. App. 3a. Petitioners designed their stock option plans to align the economic interests of their employees with the growth of the CN business enterprise as a whole, as part of what it called the Canadian National Railway Company Management Long-Term Incentive Plan. JA 45-46. The stock options generally had a ten-year term, terminable early if the employee ceased employment with a CN affiliate. JA 40-41, 46-47. Most of the options could be exercised at almost any

time during the ten-year term, although some could be exercised only if CN achieved specified financial benchmarks. JA 40-45.

When exercising options, employees could choose to pay for their shares in different ways. JA 41-42. Some paid the strike price, income-tax withholdings and administrative costs in cash, while others directed the transfer agent to sell enough shares to cover those costs. *Id.* Many employees chose to transfer their shares to their personal brokerage account to be held as a stock investment, while others chose to sell their shares at the time the options were exercised. In fact, the majority of the shares received by employees were kept as investments. *See* Pet. CA7 Separate Appendix at 45. Regardless of the method a particular employee chose, petitioners transferred only stock—not money—to their employees.

The stock options at issue in this case were "nonqualified" options. That is to say, they were not "qualified stock options" as defined in 26 U.S.C. § 3231(e)(12). Petitioners issued these options to many of their executives and managers, as well as to some of their rank-and-file employees. JA 47. Most recipients chose to hold their stock options for a lengthy period—on average, more than six years—and even when they exercised the options, many who ultimately sold the stock held it for a lengthy period before selling. JA 47-48; Pet. CA7 Separate Appendix at 45.

D. Proceedings Below

1. In 2014, petitioners filed the instant action seeking refunds of RRTA taxes they had paid or withheld when stock was transferred to their employees, pursuant to the exercise of stock options, between 2006 and 2013. Pet. App. 17a-20a.

Petitioners contended that the stock transfers did not constitute "money remuneration" under the RRTA and hence were not taxable. *Id.* at 19a-20a.

Petitioners claimed both the employer tax paid by themselves, as well as the amount they withheld from the employees and paid to the IRS on the employees' behalf. The total amount of the requested refunds—approximately $13 million—is less than 2 percent of the total RRTA taxes petitioners and their employees paid during those years (roughly $952 million). *See* District Court D.E. 1-1 (14-cv-10243); D.E. 1-1 (14-cv-10244); D.E. 1-1 (14-cv-10246) (forms showing overall RRTA taxes paid).[3]

The parties cross-moved for summary judgment based on a stipulated factual record. Pet. App. 17a. The district court sided with the government, denying the refunds. The court held that the term "money remuneration" was ambiguous and that the government's interpretation was entitled to deference under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). Pet. App. 37a-38a.

2. A divided panel of the Seventh Circuit affirmed. Noting that the RRTA was enacted during the Great Depression, the court acknowledged that "[m]aybe stock then wasn't a form of money remuneration" and thus would not have been taxable under the original meaning of the statute. Pet. App. 3a-4a. However, the court reasoned, "there is no

[3] There is no dispute that the stock options, upon exercise, gave rise to taxable income to the employees subject to *income* tax withholding. *See* 26 U.S.C. § 61(a) (levying income tax on "all income from whatever source derived"). This case presents the distinct question whether the stock *also* constitutes "money remuneration" subject to *RRTA* withholding. The income taxation of stock is not at issue in this case.

reason to think that the framers and ratifiers of the Act meant money remuneration to be limited to cash even if, as was eventually to happen, stock became its practical equivalent, just as today 100 dimes is the exact monetary equivalent of a $10 bill." *Id.* at 4a. In short, the court explained, "sheep may have once been a form of money; now stock is." *Id.*

The court deemed the Internal Revenue Code of 1939—which it acknowledged "treats 'money' and 'stock' as different concepts"—to be "of limited help here." Pet. App. 4a. Instead, the court looked to the exemption for qualified stock options, which was enacted in 2004, nearly 70 years after the RRTA was enacted, as "signal[ing]" the "equivalence of stock to cash." *Id.* Finally, the court decided that, regardless of the statutory text, "[t]he government's position also makes good practical sense." *Id.* at 5a.

Judge Manion dissented. Focusing on the statutory text, he explained that "our job is to interpret the Act as it would have been understood by people at the time it was enacted." Pet. App. 6a. He therefore concluded that "the plain language of the statute's definition of 'compensation' does not cover stock or stock options." *Id.* Judge Manion rejected the panel majority's emphasis on practicality, explaining that "we must interpret the RRTA using normal principles of statutory interpretation." *Id.* at 7a. Using that approach, he looked to the contemporary Webster's Second Dictionary in concluding that the plain meaning of "money" when the statute was enacted was "media of exchange issued by a recognized authority"—a meaning that clearly excluded stock. *Id.* at 8a. Judge Manion also focused on the textual difference between the RRTA and FICA, emphasizing that "[w]e must give effect to

Congress's distinction between 'money remuneration' and 'all remuneration.'" *Id.* at 7a.

3. Petitioners timely sought rehearing, which was denied over a dissent by Judge Manion. Pet. App. 14a-15a.

SUMMARY OF ARGUMENT

I. Petitioners' transfer of stock to their employees did not amount to "money remuneration" and therefore was not taxable "compensation" under the RRTA.

A. Statutory text must be given its plain meaning as of the time the statute was enacted. The plain meaning of "money," as used in the RRTA, is a generally accepted medium of exchange. That meaning is confirmed by Depression-era dictionaries and contemporaneous examples of usage in judicial opinions.

Stock is not "money" under this definition. It is not commonly used as a medium of exchange. No one buys groceries or pays their rent with stock. While stock can be bought and sold for money, it is not itself money. This Court and the Tax Court have repeatedly distinguished between stock and money. The committee reports accompanying the RRTA—as well as the original IRS regulation interpreting the statute—further confirm the common-sense conclusion that stock is not money.

The court of appeals seemingly agreed with petitioners that "money" is a generally accepted medium of exchange, but it erroneously held that today stock has become the "practical equivalent" of money. The court cited no authority for this surprising conclusion, which is clearly incorrect.

Under the court's reasoning—that stock worth $100 is the same as a $100 bill—the limiting word "money" is drained of meaning, as *anything* that can be sold for value would be "money."

B. The meaning of "money remuneration" is especially clear when the provision is read in context, as part of the Internal Revenue Code. The 1939 version of the Code contains the first codified versions of the RRTA and FICA. It shows, in numerous provisions, that Congress treated "money" and "stock" as different things. Even the court of appeals acknowledged that the 1939 Code—a powerful contemporaneous indicator of what the Depression-era Congress meant when it used the word "money" in a tax statute—"treats 'money' and 'stock' as different concepts." Pet. App. 4a. The modern Internal Revenue Code continues to recognize that stock is not money. And the IRS, which requires taxes to be paid in "money or its equivalent," Rev. Ruling 76-350, does *not* accept payment in stock.

C. The court of appeals mistakenly concluded that, under petitioners' interpretation, various exemptions to "compensation," including an exemption for "qualified stock options," would be rendered surplusage. The court erred in two respects. First, the exemptions were added *decades* after the RRTA—and its "money remuneration" standard—were enacted. These recent exemptions cannot change the original meaning of "money remuneration" as it was written into law in 1937. Moreover, it would be misplaced to conclude that by enacting exemptions aimed at *reducing* taxation under the RRTA, Congress actually *expanded* the RRTA's tax base. Second, the court was wrong in believing that these exemptions would be surplusage under petitioners'

interpretation. As the Eighth Circuit determined, after conducting a careful examination of each exemption, the exemptions encompass transactions that may include cash payments. *See Union Pacific*, 865 F.3d at 1050. With regard to the exemption for "qualified stock options," even the government conceded that "money is sometimes received when a qualified stock option is exercised." *Id.* Thus, petitioners' interpretation would not render the exemptions surplusage. In fact, it is the government's interpretation that would render the key term "money" surplusage.

D. Giving "money" its plain-language meaning respects the statutory text and furthers the congressional purpose of creating a railroad retirement system separate and distinct from FICA. When the same Depression-era Congress enacted both the RRTA and FICA, it used very different language in establishing the statutes' respective tax bases. Whereas the RRTA taxes only "money remuneration," FICA taxes "*all* remuneration for employment, including the cash value of all remuneration (including benefits) *paid in any medium other than cash*." *Compare* 26 U.S.C. § 3231(e)(1) (RRTA), *with* 26 U.S.C. § 3121(a) (FICA, emphasis added). Congress has maintained that same statutory text virtually unchanged for more than 80 years.

This Court should give meaning to the textual difference. The government argued below that the textual difference was "happenstance" because Congress was "rushing," and that "the phrase 'money remuneration' is reasonably construed as meaning merely remuneration." U.S. CA7 Br. at 35. But the stark disparity in language, especially when viewed in light of the statutes' history and purpose, make clear

that Congress' use of "money remuneration" was no accident. The RRTA was modeled on the pre-existing railroad pensions that were based on employees' salary or average annual pay. When enacting FICA, in contrast, Congress was writing on a blank slate. The government seeks to blur the textual differences between the two statutes and achieve what for decades Congress has steadfastly refused to do—conform the RRTA's tax base to FICA's. Giving "money remuneration" its plain-language meaning fulfills the congressional purpose of maintaining railroad retirement as a separate and distinct system, with a narrower tax base than FICA.

II. The IRS regulation does not support the government's position and is not entitled to deference in any event. The regulation purports to give RRTA "compensation" the same meaning as FICA "wages"—"except as specifically limited by the [RRTA]." 26 C.F.R. § 31.3231(e)-(1). The restriction of the RRTA's tax base to "money remuneration," as compared to FICA's "all remuneration," plainly constitutes an RRTA-specific limitation. Thus, the regulation commands the same result as the statute itself: transfers of stock are not taxable.

Even if the regulation could be read the way the government claims—as reflecting the IRS's intent to subject stock transfers to RRTA taxation—it would not be entitled to *Chevron* deference. The words "money remuneration" are not ambiguous and plainly exclude stock transfers. Nor would the regulation be a permissible interpretation, as it expressly disregards the congressional mandate, 26 U.S.C. § 3121(b)(9), that railroads are exempt from FICA taxation.

ARGUMENT

The phrase "money remuneration," as used in the RRTA, does not encompass corporate stock that a railroad transfers to its employees. Because stock is not a generally accepted medium of exchange, it is not money—a conclusion that is reinforced when the statute is read in the context of the Internal Revenue Code as a whole. That the same Depression-era Congress created two retirement systems with different tax bases—"money remuneration" (RRTA) versus "all remuneration" (FICA)—leaves no doubt that this textual difference was a deliberate choice that should be respected rather than ignored.

The court of appeals did not engage in close analysis of the statutory text and did not adhere to the meaning of the words at the time they were written. Instead, it adopted the outcome it thought made "good practical sense," basing its decision on the assertion that stock is the "practical equivalent" of money—a claim for which it provided no authority or citation. Pet. App. 4a-5a. That is not how this Court interprets statutes. As the Eighth Circuit recently concluded, based on a careful examination of the RRTA's text, structure and purpose, stock transfers are *not* "money remuneration." *Union Pacific R.R. Co. v. United States*, 865 F.3d 1045, 1049 (8th Cir. 2017).

I. Transfers Of Corporate Stock Are Not "Money Remuneration" Under The RRTA.

The RRTA taxes the "compensation" of railroad employees, which it defines as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." *See* 26 U.S.C. §§ 3201(a)-(b), 3221(a)-(b) (imposing tax on "compensation"); *id.* § 3231(e)(1) (defining "compensation"). Because stock is not "money," it is

not "compensation," and hence is not taxable under the RRTA.

A. The Plain Meaning Of "Money Remuneration" Excludes Transfers Of Stock.

Statutory interpretation "begins with the language of the statute itself," and where the statute's language is plain, "that is also where the inquiry should end." *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (quotation marks and citation omitted). This Court has consistently held that statutory text must be given its plain meaning as of the time the statute was written. *See Carcieri v. Salazar*, 555 U.S. 379, 388 (2009) ("We begin with the ordinary meaning of the [words], as understood when the [statute] was enacted."). Indeed, "[i]t is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) (quotation marks and citation omitted). Here, the ordinary meaning of the word "money"—both at the time the RRTA was enacted and today—does not include corporate stock.

1. "Money" Is A Generally Accepted Medium Of Exchange.

The ordinary meaning of "money" is a generally accepted medium of exchange. Dictionaries from the 1930s confirm this meaning. *See* Webster's New Int'l Dictionary 1583 (2d ed. 1934) ("*Webster's Second*") ("money" means currency "issued by recognized authority as a medium of exchange"); Webster's Collegiate Dictionary 630 (4th ed. 1934) (money means coins and metals "issued as a medium of exchange"); Black's Law Dictionary 1200 (3d ed. 1933)

("In its more popular sense, 'money' means any currency, tokens, bank-notes, or other circulating medium in general use as the representative of value."); Bouvier's Law Dictionary 814 (1934) ("money" includes "coins" and other "common medium[s] of exchange in a civilized nation"). *See also In re Hokulani Square*, 776 F.3d 1083, 1085-86 (9th Cir. 2015) ("[D]ictionaries mostly agree that [the word 'moneys'] refers to a generally accepted medium of exchange.").

These dictionary definitions are consistent with judicial usage. This Court has stated that "money . . . is a medium of exchange." *Railway Exp. Agency, Inc. v. Virginia*, 347 U.S. 359, 365 (1954). In *Houston & Texas Central Railroad Co. v. Texas*, 177 U.S. 66, 83-85 (1900), this Court held that treasury warrants were not "money" because they were usable only in certain limited transactions, and did not serve as a medium of exchange in commerce generally. The Court explained that the warrants lacked "a fitness for general circulation in the community as a representative and substitute for money in the common transactions of business." *Id.* at 84.

Lower courts have followed suit. As one court of appeals explained, in a case decided shortly after the RRTA's enactment, "[t]he sole function of money is as a necessary medium of exchange in all commerce which has passed the barter stage." *Emery Bird Thayer Dry Goods Co. v. Williams*, 107 F.2d 965, 971 (8th Cir. 1939).

Although the court below and the Eighth Circuit in *Union Pacific* divided over whether stock is "money," every judge on both panels seemingly *agreed* that the word "money" in the RRTA refers to a generally accepted medium of exchange. In the

decision below, the panel majority explained that "[t]he dictionary definition of money may remain constant while the instruments that comprise it change over time: sheep may once have been a form of money; now stock is." Pet. App. 4a. The dissent agreed that money refers to "media of exchange issued by a recognized authority." *Id.* at 8a. For its part, the Eighth Circuit looked to Depression-era dictionaries and other "contemporary legal authorities" in holding that the "ordinary, common meaning" of the word "money" in the RRTA is a "generally accepted medium of exchange." *Union Pacific*, 865 F.3d at 1049 (quotation marks omitted).

2. Stock Is Not A Generally Accepted Medium Of Exchange.

a. Corporate stock is not "money" because it is not a generally accepted medium of exchange. While stock can be bought and sold for money, it is not itself money, even when it has a readily-ascertainable market value. Stock is not commonly exchanged for goods or services. No one buys their groceries with stock and no one pays their rent with stock. Although stock is sometimes issued or transferred when one corporation acquires another, it is not a *generally or commonly accepted* medium of exchange in the United States. This was true in the 1930s and it remains true today.

The phrase "any form of money remuneration" in the RRTA, 26 U.S.C. § 3231(e)(1), thus includes remuneration paid in a commonly recognized governmental currency, such as dollars. The words "any form of" extend the statute's coverage to the variety of ways that money remuneration may be effected—including through paper notes and coins, checks, wire transfers, electronic direct deposits, and

so forth, and whether paid as salary, hourly wages, commissions, bonuses, or on any other basis. But the statute does *not* encompass remuneration in stock or other investment property, even when that property has a determinable market value and can be bought or sold for money. At the end of the day, if the remuneration does not take the form of *money*, it is not taxable under the RRTA.

This natural reading of "money" makes sense in the context of a statute concerning the compensation of railroad workers during the Great Depression. A railroad worker who was promised that he would be paid money for a day's hard labor would have been shocked and disappointed if, at the end of his workday, the foreman handed him a sheaf of nearly worthless shares of corporate stock. That would not have squared with his "ordinary, everyday" understanding of what money was. *See Commissioner v. Soliman*, 506 U.S. 168, 174 (1993) ("In interpreting the meaning of the words in a revenue Act, [courts] look to the ordinary, everyday senses of the words.") (quotation marks omitted). As one Depression-era court explained, "[t]here is no doubt that the word 'money' when taken in its ordinary and grammatical sense does not include corporate stocks." *In re Boyle's Estate*, 37 P.2d 841, 842 (Cal. Ct. App. 1934).

b. Two tax cases from this Court confirm the common-sense conclusion that stock is not money. In *Helvering v. Credit Alliance Corp.*, 316 U.S. 107 (1942), decided just five years after the RRTA's enactment, this Court considered a statute governing the tax treatment of distributions of "stock or securities." *Id.* at 112 (citing 49 Stat. 1688). The Court held this provision inapplicable "because the

distribution here was in property and money and not in stock or securities." *Id.*

In *Commissioner v. LoBue*, 351 U.S. 243 (1956), the Court again treated stock and money as different things. *LoBue* presented the question whether an employee realized a taxable gain for income tax purposes when he exercised an employer-provided stock option and purchased stock. The Court held that in light of the "broad coverage" of the income tax statute—which encompassed "*all* gains except those specifically exempted"—the stock purchase was taxable. *Id.* at 246-47 (emphasis added and quotation marks omitted). In reaching this conclusion, the Court expressly distinguished between stock and money, explaining that because the income tax uses such a broad tax base, "[i]t makes no difference that the compensation is paid in stock rather than in money." *Id.* at 247. For the RRTA, of course, it *does* make a difference because the tax base is limited to remuneration in "money."

The Tax Court and the IRS itself have drawn the same distinction between stock and money. In *Nestle Holdings v. Commissioner of Internal Revenue*, 94 T.C. 803 (1990), the Tax Court rejected the idea that preferred stock was "money" or a "money equivalent." The court explained that preferred stock has a "great dissimilarity to money in any practical sense," in that it is not "in the nature of money" and is not "convertible into cash at face amount as a matter of certainty" because "its market value can vary greatly over short periods of time." *Id.* at 814-15 (quotation marks omitted). The court noted that the IRS itself "concede[d] that the preferred stock is not in fact money but property other than money." *Id.* at 815.

c. The meaning of "money remuneration" is further illuminated by the House and Senate committee reports accompanying the RRTA, and by the IRS's original regulation implementing the statute. All of these sources make clear that stock transfers are not "money remuneration."

The committee reports reflect Congress' understanding that the term "money remuneration" referred to an employee's average pay, or salary. Both the House and Senate report explain that the RRTA's tax on "compensation" is based on the railroad employer's "pay roll," as memorialized in the railroads' annual reports to the Interstate Commerce Commission. *See* House Report No. 1071, 75th Cong., 1st Sess. at 3 (June 21, 1937); Senate Report No. 818, 75th Cong., 1st Sess. at 3 (June 15, 1937). The railroads' annual reports were required to "show in detail . . . the number of employees and *the salaries paid* each class" of employee. 24 Stat. 379, 386; 49 U.S.C. § 20(1) (1934) (emphasis added). Congress, in turn, used the "pay roll" numbers to project future RRTA revenue. *See* House Report at 3; Senate Report at 3. Thus, the reports establish that Congress envisioned "money remuneration" as referring to an employee's salary, or average pay—and *not* to any in-kind remuneration provided by the employer, such as food, transportation, or transfers of stock or other property.

The original IRS regulation, which was enacted soon after the RRTA's passage and kept on the books for more than 50 years, confirms this understanding. The regulation defined "compensation" to include "all remuneration in money, or in something which may be used in lieu of money (scrip and merchandise orders, for example)." 26 C.F.R. § 410.5(a) (1938).

The regulation further provided that "compensation" included "[s]alaries, wages, commissions, fees, bonuses, and any other remuneration in money or in something which may be used in lieu of money." *Id.* § 410.6(a). These examples do *not* include stock, or any type of investment property like stock. That is a telling omission, particularly given that many railroads at that time provided stock to their employees. *See* Nat'l Indus. Conf. Bd., *Employee Stock Purchase Plans in the United States* 81, 208 (1928).[4]

3. The Court Of Appeals' Ruling That Stock Is The "Practical Equivalent" Of Money Is Flawed.

The Seventh Circuit appeared to agree that the word "money" in the RRTA refers to a generally accepted medium of exchange. Pet. App. 4a. The court concluded, however, that stock (in its view) has

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[4] During the Great Depression, scrip was "private currency issued by corporations . . . to meet payrolls and which was redeemable in the company store." Loren Gatch, *Local Money in the United States During the Great Depression*, in 26 Essays in Econ. & Bus. Hist. 47-48 (2008). In the Seventh Circuit, the government conceded that "scrip," as the word appeared in the 1938 regulation, referred to "company-issued certificates" that employees could use in lieu of cash "to purchase merchandise at a company store." U.S. CA7 Br. 37. The government has now changed its position. Having uncovered a subordinate definition from *Black's Law Dictionary*, the government's new interpretation is that scrip can "encompass shares in a public company." Pet. Opp. 10. The government had it right the first time: The context in which the word "scrip" appears—joined with "merchandise orders," and appearing alongside other items used as mediums of exchange, rather than investment property—leaves no doubt that it is referring to credit used to buy merchandise at the company store. It does not refer to shares in a public corporation.

now become the "practical equivalent" of money and hence is taxable "compensation." *Id.* The court declared that just as sheep were a common medium of exchange long ago, corporate stock plays that role today. *Id.*

The court of appeals was mistaken. Stock has not become the "practical equivalent" of money. "Even stocks with readily ascertainable share prices are not 'money' because they are not mediums of exchange." *Union Pacific*, 865 F.3d at 1052. Whereas it may once have been a common practice to exchange sheep for goods and services, it is not a common practice to exchange stock for goods and services today. Moreover, while some stocks have a readily-ascertainable share price, not all do, and stock that is not publicly traded can be difficult to value and hard to sell. *See* Financial Accounting Standards Board, Statement of Financial Accounting Standards No. 23 at 183-84 (2004) (explaining that the "difficulty" of valuing shares of a nonpublic entity arises from "the lack of frequent observation of the fair value of its shares" and concluding that it may not be "possible for a nonpublic entity to reasonably estimate the fair value of its equity share options").

The court of appeals' reasoning—that stock is money because "there is no significant economic difference" between receiving $1,000 in cash and $1,000 in stock (Pet. App. 3a-4a)—ignores the text of the RRTA. Section 3231 does not tax all remuneration, or remuneration through anything with a market value; it taxes remuneration in "money." There is a large universe of items with a market value that, like stock, are regularly bought and sold. Cars, houses, land, baseball cards, comic books, bottles of fine wine—all of these things have a

market value and it may be that "there is no significant economic difference," Pet. App. 3a, between receiving one of these items and receiving its market value in the form of cash. Yet that does not transform all of these items into "money." The majority offered no limiting principle to its interpretation, under which virtually *everything* is "money."

The Seventh Circuit's declaration that treating stock as money "makes good practical sense," Pet. App. 5a, misconceives the court's task when interpreting statutes. It is the duty of the court to enforce the law as Congress wrote it. Even if the court thought that a differently-written statute would make more "practical sense," or be preferable from a policy perspective, that is a task properly left to Congress. "The role of this Court is to apply the statute as it is written—even if we think some other approach might accord with good policy." *Sandifer*, 134 S. Ct. at 878 (quotation marks omitted). In short, the Court "will not alter the text to satisfy the policy preferences of the Commissioner." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002).[5]

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[5] In appearing to recognize that "money" refers to mediums of exchange, the Seventh Circuit agreed with the Eighth Circuit, but parted ways with the Fifth Circuit—the only other court of appeals to have considered this issue. *See BNSF Ry. Co. v. United States*, 775 F.3d 743 (5th Cir. 2015). Although the Fifth Circuit acknowledged that "most" dictionaries define money as a medium of exchange, it ultimately deemed the word ambiguous and deferred to the government's interpretation. *Id.* at 752, 757. The Fifth Circuit was too quick to give up and declare ambiguity. The phrase "money remuneration" has an ordinary plain-language meaning that was well established at the time of the RRTA's enactment.

B. The Broader Context Of The Internal Revenue Code Confirms That "Money Remuneration" Does Not Include Stock.

When the phrase "money remuneration" is viewed in context—and read alongside other provisions of the Internal Revenue Code—it confirms the plain-language interpretation that corporate stock is not "money." The 1939 version of the Code provides strong evidence of what the Depression-era Congress meant when it used the word "money" in a tax context. It shows that Congress treated "stock" and "money" as different things for tax purposes. The same is true today: The modern Code repeatedly distinguishes between money and stock.

1. The 1939 Internal Revenue Code Treated "Money" And "Stock" As Different Things.

That corporate stock is not "money" under the RRTA is further confirmed by the 1939 Internal Revenue Code. That version of the Code was adopted soon after the enactment of the RRTA and FICA, and represents the first codified version of the modern federal revenue laws. The 1939 Code repeatedly distinguished between "money," on the one hand, and "other property," including stock, on the other. Even the court of appeals acknowledged that the 1939 Code "treats 'money' and 'stock' as different concepts." Pet. App. 4a.

The 1939 Code leaves no doubt that the Depression-era Congress did not consider stock to be money:

- Section 27(d) described "stock of the corporation" as "property other than money."

- Section 115(f)(2) recognized that stock is not money, explaining that when a corporate distribution is payable "either (A) in [the company's] stock . . . or (B) in money or any other property (including its stock or in rights to acquire its stock)," then the distribution is taxable "regardless of the medium in which paid."
- Section 115(h)(1) distinguished between distributions of "money" and corporate stock, providing that a corporate distribution is not considered a "distribution of earnings or profits" if "no gain to [the] distributee from the receipt of . . . stock or securities, property or money, was recognized by law."
- Section 372(b) discussed transfers "of property or money in addition to . . . stock or securities."
- Section 1857 defined a safe deposit box as any receptacle "used for the safe-keeping or storage of jewelry, plate, *money*, specie, bullion, *stocks*, bonds, *securities*, valuable papers of any kind, or other valuable personal property" (emphasis added).

Another indicator of meaning in the 1939 Code is that Congress considered "money" as having a fixed value, whereas "property other than money" has a fluctuating value. For example, Section 111(b) defined the "amount realized" for capital gains purposes as "the sum of any money received plus the fair market value of the property (other than money) received." Likewise, Section 112(c), which governed like-kind exchanges, provided that if the transferor received assets in the form of "other property or money," the taxable portion of the transaction was measured by "the sum of such money and the fair

market value of such other property." These provisions further illustrate that Congress viewed stock—which has a fluctuating rather than fixed value—as "property other than money" for tax purposes.

Had Congress wished to tax stock transfers under the RRTA, it would not have used the words "money remuneration." Instead, it would have said "all remuneration," or "remuneration in money or property," just as it did elsewhere in the Code. But it said none of those things. This Court normally presumes that Congress "means in a statute what it says there," *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992), and when Congress said that only "money remuneration" was taxable under the RRTA, it meant that only money remuneration was taxable—not remuneration in money or other property, or remuneration generally.

2. Even Today, Congress And The IRS Decline To Treat Stock As Money For Tax Purposes.

The modern Internal Revenue Code continues to maintain the distinction between money and stock. For example, dividends are issued in "money" and "distributed in lieu of [ ] stock." 26 U.S.C. § 306(c)(2)-(3). When Congress wants to encompass stock within a tax provision, it typically uses a phrase such as "property other than money." *See, e.g.*, *id.* § 118(c)(1) (contributions to capital may be made in "money or other property"); *id.* § 170(g)(2)(B) (same); *id.* § 317(a) (defining "property" for corporate redemption and dividend purposes as including both "money" and "securities"); *id.* § 461(f) (transfers of "money or other property" for tax accounting purposes); *id.* § 465(c)(7)(D)(ii) ("property other than money").

Indeed, in *Nestle Holdings*, 94 T.C. at 814-15, the IRS and the Tax Court both recognized that stock was *not* "money," but "property other than money," for purposes of determining gain for income-tax purposes under 26 U.S.C. § 1001(b).

Current IRS regulations reinforce this conclusion. The IRS allows taxes to be paid only through "money or its equivalent"—a definition the agency interprets to *exclude* stock. *See* Rev. Ruling 76-350; 26 C.F.R. §§ 301.6311-1 & 301.6311-2 (allowing taxes to be paid by check, money order, credit card or debit card). In fact, the IRS has determined that even virtual currencies, such as Bitcoin, are not "money" for federal tax purposes, apparently because their market value fluctuates. *See* Notice 2014-21, *IRS Virtual Currency Guidance*, 2014-16 I.R.B. 938. If property that *is* used as a medium of exchange is not "money" because of a fluctuating fair market value, it follows *a fortiori* that stock, which also has a fluctuating fair market value but is *not* used as a medium of exchange, cannot be "money" either.

C. The Recent Exemptions To Section 3231 Do Not Transform Stock Into "Money."

In an effort to bolster its conclusion, the Seventh Circuit relied on several exemptions to "compensation," including the exemption concerning QSOs, or "[q]ualified stock options." 26 U.S.C. § 3231(e)(12). In the court's view, those exemptions "support[ ] an inference" that "money remuneration" cannot be limited to cash or medium-of-exchange remuneration, because otherwise the exemptions would be superfluous. Pet. App. 4a-5a. Of course, the canon against surplusage cannot be invoked as a way to create ambiguity from otherwise clear text, *see Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004), and

here, the unambiguous meaning of "money" excludes stock.

The exemptions do not transform stock into "money" for two main reasons. First, the exemptions were added to the statute *decades* after the RRTA was enacted. The QSO exemption, for example, was added in 2004. For that reason, the exemptions cannot shed light on the intent of the Depression-era Congress. The meaning of the term "money remuneration" was fixed in 1937 and subsequent amendments cannot change that meaning absent an express or implied repeal. Second, the court of appeals misread the exemptions, believing that they applied *only* to non-cash benefits. In fact, each of the exemptions encompasses money payments as well as nonmonetary benefits. *See Union Pacific*, 865 F.3d at 1050-51. Giving "money remuneration" its plain meaning is therefore consistent with the rest of the statute, including the exemptions.

1. Later-Enacted Exemptions Cannot Change The Original Meaning Of "Money Remuneration."

In determining the meaning of "money remuneration," this Court looks to the meaning of the words at the time Congress enacted the RRTA. *See Sandifer*, 134 S. Ct. at 876; *Carcieri*, 555 U.S. at 388. If in 1937 "money remuneration" meant remuneration through a generally accepted medium of exchange, that is still what it means today. Later-enacted amendments cannot change that original meaning, absent a repeal. For that reason, "[t]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Phila. Nat'l Bank.*, 374 U.S. 321, 348-49 (1963).

The exemptions do not purport to change the meaning of "money remuneration." None of the exemptions makes an express repeal, and the demanding standards for an implied repeal are not met here. Implied repeal can occur only "[w]here provisions in the two acts are in irreconcilable conflict," and where "the later act covers the whole of the subject of the earlier one and is clearly intended as a substitute." *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936). Moreover, the later Congress must demonstrate a "clear and manifest" intent to achieve repeal through the new legislation. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662-63 (2007). Here, there is no conflict between the original definition and the exemptions. Nor can there be any suggestion that the exemptions were intended as a substitute for the original definition. Accordingly, the addition of the later exemptions did not impliedly repeal the original meaning of "money remuneration" as remuneration through currency or a generally accepted medium of exchange. *See Union Pacific*, 865 F.3d at 1052.

Construing these recent exemptions, as the government does, to support an interpretation of "money remuneration" broader than its original meaning fails for another reason. Congress added all of these exemptions with the purpose of *reducing* taxation under the RRTA. It would be perverse to conclude that, in doing so, it actually *expanded* the RRTA's tax base.

2. Because All Of The Exemptions Encompass Some Form Of Money Payment, They Are Not Surplusage.

The Seventh Circuit took the view that certain exemptions would be unnecessary if petitioners'

reading of "money remuneration" were correct. That is mistaken, because all of the exemptions in question, including the QSO exemption, encompass transactions that may include cash payments. Thus, the exemptions are *not* surplusage when "money" is given its plain meaning of a generally accepted medium of exchange. In fact, it is the *government's* interpretation that would render the word "money" in "money remuneration" surplusage.

The government urged the court of appeals to view this case as analogous to *United States v. Quality Stores*, 134 S. Ct. 1395, 1400 (2014), in which the Court observed that an exemption for severance payments in FICA "would be unnecessary were severance payments in general not within FICA's definition of 'wages.'" But that argument rests on a "false premise in the RRTA context." *Union Pacific*, 865 F.3d at 1050. "None of the exemptions . . . will be rendered superfluous under [petitioners'] reading of the statute because each can include payments consistent with a medium-of-exchange interpretation of 'money.'" *Id.*

The court of appeals reasoned that because the statute exempts remuneration on account of the exercise of "qualified stock options," 26 U.S.C. § 3231(e)(12), remuneration on account of *nonqualified* stock options (like those at issue here) must be considered "money remuneration" because otherwise the exemption would be surplusage. Pet. App. 4a-5a. But as the Eighth Circuit recognized, "cash payments sometimes accompany the exercise of a stock option." *Union Pacific*, 865 F.3d at 1050. Indeed, "[t]he government does not dispute . . . that money is sometimes received when a qualified stock option is exercised." *Id.* This can happen in several

ways. First, some employers transfer cash to the employee in addition to transferring the stock. *See* 26 C.F.R. § 1.422-5(c) (employers may pay employees "additional compensation, in cash or property," at the time they exercise incentive stock options). Second, sometimes the number of shares an employee is entitled to acquire is not a whole number. In that circumstance, the employee may receive cash in lieu of a fractional share. *See Union Pacific*, 865 F.3d at 1050. In short, because there are multiple circumstances in which an employee receives cash remuneration "on account of" exercising a stock option, the QSO exemption is *not* surplusage under a medium-of-exchange interpretation of "money."

The history of the QSO exemption further negates the inference drawn by the court of appeals. Congress had long excluded QSOs from the income tax, but "the IRS had been inconsistent" as to whether the employer's withholding obligation under FICA was triggered. Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in the 108th Congress* at 218-19 (May 2005). Congress accordingly sought "to clarify the treatment of [such] stock options for employment tax . . . purposes." *Id.* The resulting congressional debate focused on FICA—understandably so, as the Social Security/FICA system covers far more people than does the railroad retirement system. *See id.* at 219 (explaining that the purpose of the legislation was to "provide[ ] specific exclusions for FICA and FUTA [the Federal Unemployment Tax Act] wages"); *id.* at 219 n.378 (noting, in a footnote, the application to the RRTA). Thus, when Congress added the QSO exemption to FICA, *see* 26 U.S.C. § 3121(a)(22), it put virtually identical language into the other federal employment tax statutes, including the federal income tax

withholding statute, FUTA, and the RRTA, presumably to avoid raising an inference that a failure to include a corresponding exemption in one of these statutes could be interpreted as meaning that QSOs *were* taxable under that statute. *See* 118 Stat. 1418, 1458 (2004). In preparing a rifle-shot fix to a discrete question that had arisen concerning tax withholding for *qualified* stock options under FICA, Congress plainly had no intention of changing the law governing *nonqualified* options under the RRTA.

The remaining exemptions are unhelpful to the government for the same reason: Like the QSO exemption, they all encompass cash payments, and thus are entirely consistent with a medium-of-exchange interpretation of "money." The exemption for health and disability insurance, 26 U.S.C. § 3231(e)(1)(i), excludes "any *payment*" made to, or on behalf of, an employee on account of sickness, accident, or hospitalization. *Id.* (emphasis added). "Since this exemption covers cash payments made to an employee, it would not be rendered superfluous by interpreting 'money' to mean mediums of exchange." *Union Pacific*, 865 F.3d at 1051. The exemption for employee achievement awards, 26 U.S.C. § 3231(e)(5), applies to "any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefits from income under section 74(c), 108(f)(4), 117, or 132." As the Eighth Circuit recognized, "each of those sections includes a medium-of-exchange component." *Union Pacific*, 865 F.3d at 1051. Finally, the exemption for meals and lodging, 26 U.S.C. § 3231(e)(9), cross-references 26 U.S.C. § 119, which provides that payments from an employer to an employee are excluded from taxable

income where the employee is required to pay back the money in exchange for meals. *Id.* § 119(b)(3).[6]

Even if—contrary to all of the above—one of the exemptions did not encompass money payments, Congress sometimes creates "a degree of surplusage" in order to perform a "clarifying function." *United States v. Atl. Research Corp.*, 551 U.S. 128, 137 (2007); *see also* Joint Committee on Taxation report, *supra*, at 218-19 (stating that the exemption was intended "to clarify" the tax treatment of QSOs). By inserting various exemptions into the RRTA over the years, Congress did not purport to modify the underlying RRTA tax base. Rather, it simply removed any doubt about the statute's application in particular circumstances.

D. The Plain-Language Interpretation Gives Meaning To The Limiting Word "Money" And Respects The Textual Differences Between The RRTA And FICA.

Giving the words "money remuneration" their ordinary, plain-language meaning respects the critical textual differences between the RRTA and FICA. The same Congress that enacted the RRTA enacted FICA. Yet it established very different tax bases for the two retirement regimes: The RRTA taxes "money remuneration," 26 U.S.C. § 3231(e)(1), whereas FICA taxes "all remuneration," *id.* § 3121(a).

The government acknowledged the textual differences in the two statutes, but urged the court of

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[6] The Seventh Circuit cited two other exemptions, both of which encompass cash payments. *See* 26 U.S.C. § 3231(e)(6) (educational benefits); *id.* § 3231(e)(10)-(11) (medical and health savings plans).

appeals to treat the word "money" in the RRTA as surplusage. *See* U.S. CA7 Br. at 35 ("the phrase 'money remuneration' is reasonably construed as meaning merely remuneration"). That is the wrong approach. This Court should give meaning to the limiting word "money" rather than delete it. Doing so not only respects the text of the statute, but furthers the congressional purpose of creating a separate retirement system for railroad employees with a narrower tax base than FICA's.

1. Congress Acted Deliberately In Limiting The RRTA Tax Base To "Money" Remuneration.

Rather than create a single retirement system for all employers and employees, the New Deal Congress created two distinct systems—one for railroads and one for all other industries. That approach was consistent with Congress' traditional practice of enacting railroad-specific legislation in light of the railroads' unique role in the history of our nation. "Historically, Congress has elected to regulate the relationship of railroad workers with their employees in a series of statutes independent of those which apply to other industrial workers and their employers." *N.J. Transit Policemen's Benev. Ass'n v. N.J. Transit Corp.*, 806 F.2d 451, 454 (3d Cir. 1986).

In establishing the tax bases for the two retirement systems, Congress used language that survives and appears in the United States Code to this day:

- The RRTA taxes "compensation," defined as "money remuneration" for services rendered. *See* 50 Stat. at 436, now codified at 26 U.S.C. § 3231(e)(1).

- FICA, in contrast, taxes "wages," defined as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." *See* 49 Stat. 639, now codified at 26 U.S.C. § 3121(a).

The "historical context surrounding [the RRTA's and FICA's] passage," *Sandifer*, 134 S. Ct. at 877, explains why Congress chose to use different language in the two payroll-tax statutes. Congress designed the RRTA as a replacement for the existing railroad pension plans that were based on salary or average pay rather than non-monetary compensation. *See* pp. 5-6 *supra*. Modeling the new railroad retirement system on the existing industry pension structure helped ensure a smooth transition as the private pensions were transferred to the new federal railroad retirement program. *See* Railroad Retirement Board Handbook at 2 (noting that nearly 50,000 railroad pensions were immediately transferred); *id.* (explaining the purpose of the RRTA was to "continue and broaden *the existing* railroad programs") (emphasis added). For that reason—and perhaps to assuage a judiciary that was often unreceptive to New Deal legislation, particularly legislation that imposed substantial new obligations on industry—Congress carefully conformed its railroad retirement system to the pre-existing pension structure in the industry. Rather than create a new pension system out of whole cloth, Congress essentially federalized the railroads' pension obligations.

When enacting FICA, in contrast, Congress was writing on a blank slate. It was establishing a retirement-security program for many industries that did not have existing pension programs. Because

Congress was not replacing existing pensions, it was free to design from scratch a brand-new retirement system, including a different tax base—and it did, by taxing "all" remuneration rather than just "money" remuneration.

This Court "normally presume[s] that, where words differ as they differ here, Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006) (citation omitted). That presumption applies with particular force here. Congress adopted the "money remuneration" standard used in the RRTA *the very same month*—August 1935—that it adopted the "all remuneration" standard used in FICA.[7] The fact that in a single month, Congress created two retirement systems—but used different language to describe the tax bases—underscores that its use of "money remuneration" was a conscious and purposeful choice.

The government ascribes the textual differences to "happenstance," surmising that because Congress was "rushing to enact legislation in the crisis of the Great Depression" its choice of language was inadvertent. U.S. CA7 Br. at 54. But the Court should "not presume to ascribe this difference to a simple mistake in draftsmanship." *Russello v. United States*, 464 U.S. 16, 23 (1983). The *same* Congress used *different* words in establishing the respective tax

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[7] The phrase "money remuneration" appeared for the first time in the 1935 version of the RRTA. *See* Pub. L. No. 400, 74th Cong., 1st Sess. § 1(d), 49 Stat. 974 (1935). That version was enjoined, *see Alton R.R. Co. v. R.R. Ret. Bd.*, 16 F. Supp. 955 (D.D.C. 1936), and Congress used the same "money remuneration" language in the 1937 version of the RRTA, which survives to this day.

bases for the two retirement systems. The tax base is not a peripheral provision but rather a central element of a retirement tax-and-benefit program. *See United States v. Ressam*, 553 U.S. 272, 277 (2008) ("While it is possible that [a linguistic difference in two statutes] was inadvertent, that possibility seems remote given the stark difference that was thereby introduced into the otherwise similar texts.").

2. The Difference In Language Between The RRTA And FICA Conveys A Difference In Meaning.

This Court should respect the statutory text and treat the linguistic differences between the RRTA and FICA as conveying a difference in meaning. *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) ("[W]e presume differences in language like this convey differences in meaning."). The RRTA and FICA are both retirement-focused statutes enacted at approximately the same time by the same Congress. Both impose a payroll tax on employers and employees to fund retirement benefits. But these high-level similarities serve to underscore, rather than elide, the textual difference in the statutes' respective tax bases. "[A]lthough two statutes may be similar in language and objective, we must not fail to give effect to the differences between them." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530 (1982). Indeed, "it is axiomatic that such notable linguistic differences in two otherwise similar statutes are normally presumed to convey differences in meaning." *United States v. Smith*, 756 F.3d 1179, 1186 (10th Cir. 2014) (Gorsuch, J.).

There are two notable linguistic differences between the RRTA's and FICA's respective tax bases. First, the RRTA taxes "money remuneration." 26

U.S.C. § 3231(e)(1). FICA, in contrast, taxes "all remuneration," *id.* § 3121(a). This difference shows that Congress intended to establish a narrower tax base for the RRTA by taxing only a *subset* of all the forms of remuneration that railroad employees received. As shown above, this conformed the new federal railroad pension structure to the pre-existing railroad pension structure.

Second, when it enacted FICA, Congress added a critical phrase that it chose *not* to include in the RRTA. In FICA, Congress expressly defined "wages" to "includ[e] the cash value of all remuneration (including benefits) paid *in any medium other than cash*." 26 U.S.C. § 3121(a) (emphasis added). Had Congress intended the RRTA to encompass nonmonetary remuneration, such as stock, it would have included similar language in the RRTA. *See Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017) (when Congress does not adopt obvious alternative language, that indicates it did not intend the alternative).

The government's interpretation of the RRTA would nullify these textual differences. This approach is impermissible in most circumstances, but it would be particularly offensive here given that the language the government wants to delete is the very *definition* of the key statutory term. The words "money remuneration" establish what Congress intended the word "compensation" to mean, and a court has no license to reject the RRTA's definition of "compensation" as "money remuneration" and replace it with "all remuneration," as the government expressly urged the court of appeals to do. "When a statute includes an explicit definition, [courts] must

follow that definition." *Burgess v. United States*, 553 U.S. 124, 130 (2008) (quotation marks omitted).

The government's approach also conflicts with 26 U.S.C. § 3121(b)(9), the FICA provision that *exempts* railroad employers and employees from paying FICA taxes. Subsection (b)(9) excludes from FICA "employment" any "service performed by an individual as an employee or employee representative as defined in section 3231." Section 3231, in turn, defines railroad "employers" and "employees." *Id.* § 3231(a)-(b). The government's effort to equate RRTA "compensation" with FICA "wages"—effectively subjecting railroads to the FICA tax structure—would render this provision virtually meaningless.

3. Giving "Money Remuneration" Its Ordinary Meaning Furthers The Congressional Purpose.

Giving "money remuneration" its plain language meaning furthers the congressional purpose in two key respects. It maintains the RRTA's overall structure—a narrower tax base, offset in part by higher tax rates. And it preserves the RRTA as a distinct railroad-only retirement system.

The RRTA's text and history show that Congress intended the RRTA to have a narrower tax base than FICA. For that reason, it adopted the "money remuneration" standard rather than FICA's broad "all remuneration" standard. A narrower tax base makes perfect sense because the RRTA imposes higher tax *rates* than does FICA. *See Standard Office Bldg. Corp. v. United States*, 819 F.2d 1371, 1373 (7th Cir. 1987). In fact, the tax rates can differ substantially. In 2017, for example, railroad employers paid 20.75 percent, and railroad employees paid 12.55 percent of

their compensation, up to the annual compensation caps. Under FICA, in contrast, employers and employees each paid only 7.65 percent of their wages, up to the annual wage caps. *See* RRB Bureau of the Actuary, Tax Rates & Maximum Taxable Earnings, *available at* https://rrb.gov/sites/default/files/2017-11/taxrate_6.pdf. Of course, the RRTA also provides more generous benefits—not just the Tier 1 benefits that are analogous to Social Security, but also the Tier 2 benefits that are analogous to a private pension. In all of these ways, the RRTA's structure differs substantially from FICA's. *See* Whitman at 41 ("[A]lthough the Railroad Retirement program and Social Security share a number of common elements, key differences also exist between the two in areas such as funding and benefit structure."). Petitioners' interpretation of "money remuneration" respects these differences, whereas the government's interpretation, which blurs the textual distinctions between the RRTA and FICA, does not.

Equating RRTA "compensation" with FICA "wages" would frustrate the congressional objective of a distinct, railroad-specific retirement system. Congress enacted railroad retirement as a separate program—and it has maintained it as a separate program for more than 80 years, despite efforts to conform the RRTA's tax base to FICA's. *See* 138 Cong. Rec. S1362-02, S1474 (Feb. 7, 1992). Even though both statutes have been amended many times, Congress has steadfastly preserved the RRTA/FICA distinction, just as it has preserved the definitions of RRTA "compensation" and FICA "wages." In a similar context, this Court has warned against ignoring the differences between railroad-specific statutes and statutes governing other industries. *See Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570,

579 n.11 (1971) (cautioning that "parallels between the [National Labor Relations Act] and the Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes").

In the year 2018, the notion of a distinct railroad-only retirement system may seem quaint. "[T]he evolution of [the railroad industry] might invite reasonable disagreements on whether Congress should reenter the field and alter the judgments it made in the past." *Henson*, 137 S. Ct. at 1725. But it is the prerogative of Congress, not the courts, to conform the RRTA to FICA, should it choose to do so.

II. The IRS Regulation Does Not Support The Government And Does Not Deserve Deference.

Soon after the RRTA's enactment, the IRS issued a regulation interpreting "compensation" to include "all remuneration in money, or in something which may be used in lieu of money." 26 C.F.R. § 410.5(a) (1938). It maintained that regulation on the books for more than fifty years.

The agency changed course in 1994. That year, it issued what stands today as its current regulation, which provides that "compensation" has "the same meaning as the term wages in [FICA] . . . *except as specifically limited by the Railroad Retirement Tax Act*." 26 C.F.R. § 31.3231(e)-1 (emphasis added).

The regulation does not support the government's position in this case because the RRTA *does* "specifically limit" what would otherwise be taxable under FICA. Unlike FICA, which applies to "all" remuneration, the RRTA is "specifically limited" to "money" remuneration. Thus, under a

straightforward interpretation of the IRS regulation, it commands the same result as the statute itself: The RRTA's specific limitation must be enforced and stock transfers are not taxable because they are not "money remuneration." Put differently, the only way the regulation supports the government's position is if the word "money" is excised from the statute.

Even if the regulation could plausibly be read the way the government claims, it would not be entitled to deference. It fails *Chevron* step one because Congress has "directly spoken to the precise question at issue." 467 U.S. at 842. As discussed above, the plain meaning of "money remuneration," when considered using traditional tools of statutory construction, does not include stock. "When the words of a statute are unambiguous . . . judicial inquiry is complete." *Germain*, 503 U.S. at 254 (quotation marks omitted).

The words "money remuneration" are unambiguous. Indeed, it would be anomalous to deem the term ambiguous given that it is Congress' definition of "compensation." It is unlikely that Congress, in providing its *own* definition of compensation, actually wished the agency to define the term through regulation. Because "[s]tatutory definitions control the definition of statutory words," *Burgess*, 553 U.S. at 130, there is no basis for deferring to the IRS's regulation here.

The regulation also fails *Chevron* step two because it is not a permissible interpretation of the statute. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (even under *Chevron*, "agencies must operate within the bounds of reasonable interpretation") (quotation marks omitted). In the agency's view, the words "money remuneration" are not a specific limitation,

whereas the various exemptions are. U.S. CA7 Br. at 42. This interpretive technique is precisely what this Court held agencies may *not* do: "*Chevron* allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not." *Michigan v. EPA*, 135 S. Ct. at 2708.

Moreover, as interpreted by the IRS in this case, the regulation would nullify 26 U.S.C. § 3121(b)(9), which provides that FICA is *inapplicable* to railroads. The regulation states that, subject to specific RRTA limitations, the IRS will treat FICA "wages" as equivalent to RRTA "compensation" "*without regard to section 3121(b)(9).*" 26 C.F.R. § 31.3231(e)-1 (emphasis added). In other words, despite an express statutory mandate that railroads may *not* be taxed based on FICA "wages," the IRS regulation purports to do exactly that—"without regard to" the congressional command. A regulation that declares an express disregard for a statutory provision is plainly unreasonable and contrary to law.

The IRS has asserted that its regulation furthers what it claims to have discerned as "the congressional goal of making the systems parallel," Internal Revenue Service, *Update of Railroad Retirement Tax Act Regulations*, 58 Fed. Reg. 28,366, 28,367 (May 13, 1993). That purported goal is directly contradicted by what Congress said in Section 3121(b)(9), and it is a "core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014). The IRS's attempt to equate RRTA "compensation" and

FICA "wages" is a textbook example of an agency attempting to achieve by regulation what Congress has refused to do through legislation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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ADDENDUM

Railroad Retirement Tax Act
26 U.S.C. § 3231(e)

(e) Compensation

For purposes of this chapter—

(1) The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers. Such term does not include (i) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of sickness or accident disability or medical or hospitalization expenses in connection with sickness or accident disability or death, except that this clause does not apply to a payment for group-term life insurance to the extent that such payment is includible in the gross income of the employee, (ii) tips (except as is provided under paragraph (3)), (iii) an amount paid specifically—either as an advance, as reimbursement or allowance—for traveling or other bona fide and necessary expenses incurred or reasonably expected to be incurred in the business of the employer provided any such payment is identified by the employer either by a separate payment or by specifically indicating the separate amounts where both wages and expense reimbursement or allowance are combined in a single payment, or (iv) any remuneration which would not (if chapter 21 applied to such remuneration) be treated as wages (as defined

in section 3121(a)) by reason of section 3121(a)(5). Such term does not include remuneration for service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act, as amended, and which is performed to carry out the purpose specified in subparagraph (F), (J), (M), or (Q), as the case may be. For the purpose of determining the amount of taxes under sections 3201 and 3221, compensation earned in the service of a local lodge or division of a railway-labor-organization employer shall be disregarded with respect to any calendar month if the amount thereof is less than $25. Compensation for service as a delegate to a national or international convention of a railway labor organization defined as an "employer" in subsection (a) of this section shall be disregarded for purposes of determining the amount of taxes due pursuant to this chapter if the individual rendering such service has not previously rendered service, other than as such a delegate, which may be included in his "years of service" for purposes of the Railroad Retirement Act. Nothing in the regulations prescribed for purposes of chapter 24 (relating to wage withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "compensation" in regulations prescribed for purposes of this chapter.

(2) Application of contribution bases

(A) Compensation in excess of applicable base excluded

(i) In general

The term "compensation" does not include that part of remuneration paid during any calendar year to

an individual by an employer after remuneration equal to the applicable base has been paid during such calendar year to such individual by such employer for services rendered as an employee to such employer.

(ii) Remuneration not treated as compensation excluded

There shall not be taken into account under clause (i) remuneration which (without regard to clause (i)) is not treated as compensation under this subsection.

(iii) Hospital insurance taxes

Clause (i) shall not apply to—

(I) so much of the rate applicable under section 3201(a) or 3221(a) as does not exceed the rate of tax in effect under section 3101(b), and

(II) so much of the rate applicable under section 3211(a) as does not exceed the rate of tax in effect under section 1401(b).

(B) Applicable base

(i) Tier 1 taxes

Except as provided in clause (ii), the term "applicable base" means for any calendar year the contribution and benefit base determined under section 230 of the Social Security Act for such calendar year.

(ii) Tier 2 taxes, etc.

For purposes of—

(I) the taxes imposed by sections 3201(b), 3211(b), and 3221(b), and

(II) computing average monthly compensation under section 3(j) of the

Railroad Retirement Act of 1974 (except with respect to annuity amounts determined under subsection (a) or (f)(3) of section 3 of such Act), clause (2) of the first sentence, and the second sentence, of subsection (c) of section 230 of the Social Security Act shall be disregarded.

(C) Successor employers

For purposes of this paragraph, the second sentence of section 3121(a)(1) (relating to successor employers) shall apply, except that—

(i) the term "services" shall be substituted for "employment" each place it appears,

(ii) the term "compensation" shall be substituted for "remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection)" each place it appears, and

(iii) the terms "employer", "services", and "compensation" shall have the meanings given such terms by this section.

(3) Solely for purposes of the taxes imposed by section 3201 and other provisions of this chapter insofar as they relate to such taxes, the term "compensation" also includes cash tips received by an employee in any calendar month in the course of his employment by an employer unless the amount of such cash tips is less than $20.

(4)

(A) For purposes of applying sections 3201(a), 3211(a), and 3221(a), in the case of payments made to an employee or any of his dependents on account of sickness or accident disability, clause (i) of the second

sentence of paragraph (1) shall exclude from the term "compensation" only—

(i) payments which are received under a workmen's compensation law, and

(ii) benefits received under the Railroad Retirement Act of 1974.

(B) Notwithstanding any other provision of law, for purposes of the sections specified in subparagraph (A), the term "compensation" shall include benefits paid under section 2(a) of the Railroad Unemployment Insurance Act for days of sickness, except to the extent that such sickness (as determined in accordance with standards prescribed by the Railroad Retirement Board) is the result of on-the-job injury.

(C) Under regulations prescribed by the Secretary, subparagraphs (A) and (B) shall not apply to payments made after the expiration of a 6-month period comparable to the 6-month period described in section 3121(a)(4).

(D) Except as otherwise provided in regulations prescribed by the Secretary, any third party which makes a payment included in compensation solely by reason of subparagraph (A) or (B) shall be treated for purposes of this chapter as the employer with respect to such compensation.

(5) The term "compensation" shall not include any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 108(f)(4), 117, or 132.

(6) The term "compensation" shall not include any payment made, or benefit furnished, to or for the

benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127.

[(7) Repealed. Pub. L. 113-295, div. A, title II, § 221(a)(19)(B)(v), Dec. 19, 2014, 128 Stat. 4040.]

(8) Treatment of certain deferred compensation and salary reduction arrangements

(A) Certain employer contributions treated as compensation

Nothing in any paragraph of this subsection (other than paragraph (2)) shall exclude from the term "compensation" any amount described in subparagraph (A) or (B) of section 3121(v)(1).

(B) Treatment of certain nonqualified deferred compensation

The rules of section 3121(v)(2) which apply for purposes of chapter 21 shall also apply for purposes of this chapter.

(9) Meals and lodging

The term "compensation" shall not include the value of meals or lodging furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119.

(10) Archer MSA contributions

The term "compensation" shall not include any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(b).

(11) Health savings account contributions

The term "compensation" shall not include any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(d).

(12) Qualified stock options

The term "compensation" shall not include any remuneration on account of—

(A) a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b)), or

(B) any disposition by the individual of such stock.

Federal Insurance Contributions Act
26 U.S.C. § 3121(a)

(a) Wages For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term shall not include—

(1) in the case of the taxes imposed by sections 3101(a) and 3111(a) that part of the remuneration which, after remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) with respect to employment has been paid to an individual by an employer during the calendar year with respect to which such contribution and benefit base is effective, is paid to such individual by such employer during such calendar year. If an employer (hereinafter referred to as successor employer) during any calendar year acquires substantially all the property used in a trade or business of another employer (hereinafter referred to as a predecessor), or used in a separate unit of a trade or business of a predecessor, and immediately after the acquisition employs in his trade or business an individual who immediately prior to the acquisition was employed in the trade or business of such predecessor, then, for the purpose of determining whether the successor employer has paid remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) to such individual during such calendar year, any remuneration (other than

remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment paid (or considered under this paragraph as having been paid) to such individual by such predecessor during such calendar year and prior to such acquisition shall be considered as having been paid by such successor employer;

(2) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of—

(A) sickness or accident disability (but, in the case of payments made to an employee or any of his dependents, this subparagraph shall exclude from the term "wages" only payments which are received under a workman's compensation law), or

(B) medical or hospitalization expenses in connection with sickness or accident disability, or

(C) death, except that this paragraph does not apply to a payment for group-term life insurance to the extent that such payment is includible in the gross income of the employee;

[**(3)** Repealed. Pub. L. 98–21, title III, § 324(a)(3)(B), Apr. 20, 1983, 97 Stat. 123]

(4) any payment on account of sickness or accident disability, or medical or hospitalization expenses in connection with sickness or accident

disability, made by an employer to, or on behalf of, an employee after the expiration of 6 calendar months following the last calendar month in which the employee worked for such employer;

(5) any payment made to, or on behalf of, an employee or his beneficiary—

(A) from or to a trust described in section 401(a) which is exempt from tax under section 501(a) at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust,

(B) under or to an annuity plan which, at the time of such payment, is a plan described in section 403(a),

(C) under a simplified employee pension (as defined in section 408(k)(1)), other than any contributions described in section 408(k)(6),

(D) under or to an annuity contract described in section 403(b), other than a payment for the purchase of such contract which is made by reason of a salary reduction agreement (whether evidenced by a written instrument or otherwise),

(E) under or to an exempt governmental deferred compensation plan (as defined in subsection (v)(3)),

(F) to supplement pension benefits under a plan or trust described in any of the foregoing provisions of this paragraph to take into account some portion or all of the increase in the cost of living (as determined by the Secretary of Labor) since retirement but only if such supplemental payments are under a plan which is treated as a

welfare plan under section 3(2)(B)(ii) of the Employee Retirement Income Security Act of 1974,

(G) under a cafeteria plan (within the meaning of section 125) if such payment would not be treated as wages without regard to such plan and it is reasonable to believe that (if section 125 applied for purposes of this section) section 125 would not treat any wages as constructively received,

(H) under an arrangement to which section 408(p) applies, other than any elective contributions under paragraph (2)(A)(i) thereof, or

(I) under a plan described in section 457(e)(11)(A)(ii) and maintained by an eligible employer (as defined in section 457(e)(1));

(6) the payment by an employer (without deduction from the remuneration of the employee)—

(A) of the tax imposed upon an employee under section 3101, or

(B) of any payment required from an employee under a State unemployment compensation law, with respect to remuneration paid to an employee for domestic service in a private home of the employer or for agricultural labor;

(7)

(A) remuneration paid in any medium other than cash to an employee for service not in the course of the employer's trade or business or for domestic service in a private home of the employer;

(B) cash remuneration paid by an employer in any calendar year to an employee for domestic service in a private home of the employer (including domestic service on a farm operated for profit), if the cash remuneration paid in such year by the employer to the employee for such service is less than the applicable dollar threshold (as defined in subsection (x)) for such year;

(C) cash remuneration paid by an employer in any calendar year to an employee for service not in the course of the employer's trade or business, if the cash remuneration paid in such year by the employer to the employee for such service is less than $100. As used in this subparagraph, the term "service not in the course of the employer's trade or business" does not include domestic service in a private home of the employer and does not include service described in subsection (g)(5);

(8)

(A) remuneration paid in any medium other than cash for agricultural labor;

(B) cash remuneration paid by an employer in any calendar year to an employee for agricultural labor unless—

(i) the cash remuneration paid in such year by the employer to the employee for such labor is $150 or more, or

(ii) the employer's expenditures for agricultural labor in such year equal or exceed $2,500, except that clause (ii) shall not apply in determining whether remuneration paid to an

employee constitutes "wages" under this section if such employee (I) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (II) commutes daily from his permanent residence to the farm on which he is so employed, and (III) has been employed in agriculture less than 13 weeks during the preceding calendar year;

[**(9)** Repealed. Pub. L. 98–21, title III, § 324(a)(3)(B), Apr. 20, 1983, 97 Stat. 123]

(10) remuneration paid by an employer in any calendar year to an employee for service described in subsection (d)(3)(C) (relating to home workers), if the cash remuneration paid in such year by the employer to the employee for such service is less than $100;

(11) remuneration paid to or on behalf of an employee if (and to the extent that) at the time of the payment of such remuneration it is reasonable to believe that a corresponding deduction is allowable under section 217 (determined without regard to section 274(n));

(12)

(A) tips paid in any medium other than cash;

(B) cash tips received by an employee in any calendar month in the course of his employment by an employer unless the amount of such cash tips is $20 or more;

(13) any payment or series of payments by an employer to an employee or any of his dependents which is paid—

(A) upon or after the termination of an employee's employment relationship because of (i) death, or (ii) retirement for disability, and

(B) under a plan established by the employer which makes provision for his employees generally or a class or classes of his employees (or for such employees or class or classes of employees and their dependents), other than any such payment or series of payments which would have been paid if the employee's employment relationship had not been so terminated;

(14) any payment made by an employer to a survivor or the estate of a former employee after the calendar year in which such employee died;

(15) any payment made by an employer to an employee, if at the time such payment is made such employee is entitled to disability insurance benefits under section 223(a) of the Social Security Act and such entitlement commenced prior to the calendar year in which such payment is made, and if such employee did not perform any services for such employer during the period for which such payment is made;

(16) remuneration paid by an organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)) or under section 521 in any calendar year to an employee for service rendered in the employ of such organization, if the remuneration paid in such year by the organization to the employee for such service is less than $100;

[**(17)** Repealed. Pub. L. 113–295, div. A, title II, § 221(a)(19)(B)(iv), Dec. 19, 2014, 128 Stat. 4040]

(18) any payment made, or benefit furnished, to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127, 129, 134(b)(4), or 134(b)(5);

(19) the value of any meals or lodging furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119;

(20) any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 108(f)(4), 117, or 132;

(21) in the case of a member of an Indian tribe, any remuneration on which no tax is imposed by this chapter by reason of section 7873 (relating to income derived by Indians from exercise of fishing rights);

(22) remuneration on account of—

(A) a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b)), or

(B) any disposition by the individual of such stock; or

(23) any benefit or payment which is excludable from the gross income of the employee under section 139B(b).

Nothing in the regulations prescribed for purposes of chapter 24 (relating to income tax withholding) which

provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "wages" in the regulations prescribed for purposes of this chapter. Except as otherwise provided in regulations prescribed by the Secretary, any third party which makes a payment included in wages solely by reason of the parenthetical matter contained in subparagraph (A) of paragraph (2) shall be treated for purposes of this chapter and chapter 22 as the employer with respect to such wages.

No. 17-530

In the Supreme Court of the United States

WISCONSIN CENTRAL, LTD., ET AL.

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether income realized by railroad employees upon the exercise of non-qualified stock options that petitioners granted to their employees in the course of employment is taxable "compensation" under the Railroad Retirement Tax Act, 26 U.S.C. 3231(e).

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In the Supreme Court of the United States

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WISCONSIN CENTRAL, LTD. ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 856 F.3d 490. The order and opinion of the district court (Pet. App. 16a-42a) is reported at 194 F. Supp. 3d 728.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 2017. A petition for rehearing was denied on July 12, 2017 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on October 6, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Railroad Retirement Tax Act (RRTA), 26 U.S.C. 3201 *et seq.*, railroad employees' "compensation" is subject to taxes that are used to fund a statutory program of retirement benefits. 26 U.S.C. 3201(a) and (b) (2012 & Supp. IV 2016). In structure

and purpose, the RRTA largely parallels the Federal Insurance Contributions Act (FICA) tax, which funds Social Security. See 26 U.S.C. 3101-3128 (2012 & Supp. IV 2016). Railroad employees are exempt from FICA. See 26 U.S.C. 3121(b)(9).

The RRTA defines "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. 3231(e)(1). Congress has enacted several exceptions to the RRTA's definition of taxable "compensation." These include an exception for "qualified" stock options (QSOs), a type of stock option that generally enjoys favorable income- and employment-tax treatment under the Internal Revenue Code.[1] 26 U.S.C. 3231(e)(12) (exclusion of QSOs from RRTA definition of "compensation"); see 26 U.S.C. 421, 422 (providing that, if statutory requirements are met, an employee does not recognize income on the grant or exercise of a QSO, but instead recognizes capital gains upon the stock's disposition); 26 U.S.C. 3121(a)(22) (excluding QSOs from FICA taxes).

b. In 1937, when the RRTA was enacted, the U.S. Department of Treasury (Treasury Department) promulgated a regulation construing the term "compensation" under the RRTA as "all remuneration in money, or in something which may be used in lieu of money (scrip and merchandise orders, for example)." 26 C.F.R. 410.5 (1938). In 1994, the Treasury Department issued a new

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[1] An "option" to buy a stock permits an employee to buy the stock at a fixed price—the "strike price"—at a specified time or when specified conditions are met. See *Black's Law Dictionary* 1268 (10th ed. 2014); Pet. App. 3a. If the price of the stock rises above the strike price, the option is valuable because it permits the option-holder to buy stocks at a below-market price.

regulation providing that, "except as specifically limited by the [RRTA] * * * or regulation," compensation under the RRTA "has the same meaning as the term wages in [FICA] section 3121(a)." 26 C.F.R. 31.3231(e)-1(a)(1) (emphasis omitted). FICA defines "wages" as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." 26 U.S.C. 3121(a) (2012 & Supp. IV 2016).

c. During the period that the RRTA has been in effect, railroad companies have routinely used stock options, including non-qualified stock options (NQSOs), as a method of compensating employees. There is no dispute that an employee who exercises an NQSO realizes income, calculated as the difference between the fair market value of the shares awarded and the amount that the employees must pay for the shares. See 26 U.S.C. 83(a). For many years, railroads have also treated the income realized upon exercise of the option as "'money remuneration'" subject to tax under the RRTA, "and accordingly paid RRTA tax on" that income. Pet. App. 36a (citation omitted). Recently, however, several railroads have filed refund suits, asserting that NQSOs are not taxable under the RRTA because they are not a "form of money remuneration" and therefore do not fall within the definition of "compensation" contained in 26 U.S.C. 3231(e)(1). See Pet. App. 20a.

2. a. Petitioners are subsidiaries of Canadian National Railroad Company (CN) and operate railroads in the United States. Pet. App. 17a; Pet. 7. Since 1996, petitioners have compensated some employees with NQSOs for shares in CN, which is publicly traded on the New York Stock Exchange. Pet. App. 2a, 17a-18a; C.A. Separate App. 3. Petitioner's employees could exercise

their options and receive shares of CN stock, or they could exercise their options, ask the broker to immediately sell their shares, and simply receive cash that represented the difference between the strike price and the market price at the time that the option was exercised. Pet. App. 3a-4a.

In 2014, petitioners filed suit against the federal government, seeking about $13 million in tax refunds. Pet. App. 20a; Pet. 9. They alleged that they had overpaid RRTA taxes by paying taxes on the income that their employees realized when they exercised their stock options. Pet. App. 2a, 17a, 20a. They sought refunds of the employer and employee portions of RRTA taxes paid on those options between 2006 and 2013. *Ibid.*

b. After the parties filed cross-motions for summary judgment on a set of stipulated facts, the district court awarded summary judgment to the government. Pet. App. 17a-42a. The court applied the framework set out in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which the parties agreed was applicable. Pet. App. 20a. The court found the term "any form of money remuneration" ambiguous as applied to stock options like the NQSOs at issue here. *Id.* at 24a; see *id.* at 23a-25a. In finding ambiguity, the court noted that the government had cited dictionary definitions of "money" that readily swept in such stock options, *id.* at 23a-24a (discussing examples from *Oxford English Dictionary* and *Black's Law Dictionary*), while petitioners had cited definitions of "money" that were narrower, *ibid.* (citing *Oxford English Dictionary* and *Merriam-Webster Dictionary*).

The district court wrote that, "if anything, the statutory structure favors the Government's reading over [petitioners']." Pet. App. 25a. The court explained that

the RRTA's general definition of "compensation" is followed by numerous exceptions for noncash benefits, including an exception for qualified stock options, which suggested that "any form of money remuneration" includes noncash remuneration such as stock. *Id.* at 26a-29a. The court observed that "Congress would have had no need to carve" out such "exception[s] if it did not consider" the things excepted to be a "form of money remuneration" in the first place. *Id.* at 27a-28a. The court noted that this Court had applied a similar analysis in *United States* v. *Quality Stores*, 134 S. Ct. 1395, 1400 (2014), in holding that an express exemption for a type of severance payment in the parallel FICA statute supported the conclusion that severance payments generally were FICA wages, because the express exemption otherwise would have been unnecessary. Pet. App. 28a. The court also observed that numerous courts have recognized the parallels between RRTA and FICA, and have found that such parallels supported construing the statutes as having a similar reach. *Id.* at 30a-31a.

After finding the term "any form of money remuneration" ambiguous, the district court concluded that the agency had reasonably construed "compensation" to reach stock options in 26 C.F.R. 31.3231(e)-1, which generally aligns RRTA "compensation" with FICA wages. Pet. App. 37a-42a. The court reiterated its conclusion that the phrase "any form of money remuneration" could be construed to reach stock options and that the RRTA's overall structure supported that interpretation. *Id.* at 38a. The court further stated that "[c]ommon sense supports the reasonableness of Treasury's interpretation" because "[s]tock options are financial instruments" that "are readily and regularly convertible into cash, distinguishing them from most non-money

property." *Ibid.* The court also observed that this reading "eliminates the possibility that railroads could structure their compensation packages in such a way as to substantially reduce their RRTA tax burden." *Id.* at 39a.

c. The court of appeals affirmed. Pet. App. 1a-5a. The court held that the definition of "compensation" set forth in 26 U.S.C. 3231(e)(1) clearly includes stock options, rejecting petitioners' argument that the phrase "any form of money remuneration" refers solely to cash and a narrow set of cash equivalents. Pet. App. 1a-5a. The court stated that, regardless of whether stock was "a form of money remuneration" when the RRTA was enacted, stock is now the "practical equivalent" of cash. *Id.* at 4a. It also observed that "[t]he dictionary definition of money may remain constant while the instruments that comprise it change over time." *Ibid.*

The court of appeals further explained that the structure of the RRTA supports the conclusion that stock options constitute a "form of money remuneration." Pet. App. 4a. It emphasized that the statutory definition of "compensation" contains an exclusion for qualified stock options. *Ibid.* The court observed that the exception "supports an inference that *non-qualified* stock options, which are the options at issue in this case, are covered by the term 'money remuneration' and are therefore taxable." *Id.* at. 4a-5a. The court noted that Section 3231(e) also contains exceptions for several other non-cash benefits, "reinforc[ing] the inference that non-qualified stock options are 'money remuneration'" and therefore taxable. *Id.* at 5a (citing examples). The court added that the government's position made "good practical sense" because it avoids "the creation of

a tax incentive that might distort the ways in which employers structure compensation packages." *Ibid.* And it observed that its reading accorded with prior decisions addressing the classification of stock options under the RRTA. *Ibid.* (citing *BNSF Ry.* v. *United States*, 775 F.3d 743 (5th Cir. 2015); *CSX Corp.* v. *United States*, No. 15-cv-427, 2017 WL 2800181 (M.D. Fla. May 2, 2017)).

Judge Manion dissented. Pet. App. 5a-13a. He viewed it as "clear" that stock options do not constitute a form of "money remuneration" under the RRTA. *Id.* at 7a. Judge Manion relied on differences between the language of the RRTA and FICA, the definition of "money" in the edition of *Webster's New International Dictionary* that was issued in 1934, and inferences from other provisions of the Internal Revenue Code of 1939. *Id.* at 7a-9a. Judge Manion concluded that the RRTA's explicit exclusions for qualified stock options and other noncash remuneration did not support the government's position because those exclusions were enacted after the basic definition of RRTA "compensation" and did not impliedly repeal the earlier definition. *Id.* at 10a-12a. While recognizing that later enactments can shed light on an earlier provision that is ambiguous, *id.* at 12a (citing Antonin Scalia and Bryan A. Garner, *Reading the Law: The Interpretation of Legal Texts* 330 (2012)), Judge Manion concluded that the principle did not apply here because, in his view, the RRTA's definition of "compensation" unambiguously excludes stock options. *Ibid.*

DISCUSSION

Like most courts that have considered the question, the court of appeals correctly held that income realized on the exercise of non-qualified stock options is taxable

compensation under the RRTA. The Eighth Circuit, however, has reached a contrary conclusion. See *Union Pac. R.R.* v. *United States*, 865 F.3d 1045 (2017). The Court's review is warranted to resolve this conflict on an important legal question and to further the uniform administration of the federal tax laws.

1. The income realized upon the exercise of NQSOs is "compensation" subject to taxation under the RRTA. The RRTA defines "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. 3231(e)(1). That term encompasses income from stock options. Many dictionary definitions of "money" reach items, like stock options, that are the practical equivalent of cash. See, *e.g.*, 6 *The Oxford English Dictionary* 603 (1931) (reprinted 1978) ("property or possessions of any kind viewed as convertible into money or having value expressible in terms of money"). And when, as here, "money" is used as an adjective, it often has a particularly broad meaning. *BNSF Ry.* v. *United States*, 775 F.3d 743, 753-754 (5th Cir. 2015) (citing *Random House Webster's Unabridged Dictionary* 1241 (2d ed. 2001)). Congress's use of the term "any" before "form of money remuneration" reinforces the breadth of the statutory phrase. See *United States* v. *Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 7 (2008) (noting "expansive" reach of Internal Revenue Code's use of "any").

Consideration of 26 U.S.C. 3231(e) as a whole reinforces the conclusion that income from stock options is a "form of money remuneration." The express exclusions in Section 3231(e) for income from certain types of stock options, 26 U.S.C. 3231(e)(12), implies that income from other options is "compensation," cf. *United States*

v. *Quality Stores*, 134 S. Ct. 1395, 1398 (2014) (similarly inferring from exception for one type of severance payment that other severance payments are FICA "wages"). Additional exclusions for other types of noncash benefits likewise indicate that "money remuneration" is not limited to cash. *E.g.*, 26 U.S.C. 3231(e)(1)(i) (health insurance benefits); 3231(e)(5) (employee achievement awards in the form of tangible personal property); 3231(e)(9) (meals and lodging).

Petitioners argue (Pet. 16-17) that these exclusions are irrelevant because they were enacted after the term "money remuneration" itself. But as petitioners acknowledge, "later enactments" can shed light on the meaning of pre-existing statutory language. Pet. 17. Petitioners also state that the exclusion of qualified stock options from the definition of "compensation" would not be a nullity on their view of the statute because an employee who exercises an option can receive cash in lieu of a fractional share of stock "'when the number of shares an employee can acquire at exercise is not a whole number.'" *Ibid.* (citation omitted). But it is implausible that Congress enacted a broadly worded exclusion that extends to "transfer[s] of a share of stock" and "disposition[s]" of stock, 26 U.S.C. 3231(e)(12), simply to reach small amounts of cash paid in lieu of fractional shares of stock, see, *e.g.*, 26 U.S.C. 305; 26 C.F.R. 1.305-3(c). See *Quality Stores*, 134 S. Ct. at 1401 ("'When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.'") (quoting *Stone* v. *INS*, 514 U.S. 386, 397, (1995)). And the legislative history confirms that the exception for qualified stock options was aimed at excluding the options themselves. See H.R. Rep. No. 548, 108th Cong., 2d Sess. 144-145 (2004).

Petitioners suggest (Pet. 5-6) that "money remuneration" must be understood to exclude NQSOs because Congress made "all remuneration" generally taxable under FICA while making "any form of money remuneration" generally taxable under the RRTA. See 26 U.S.C. 3121(a) (2012 & Supp. IV 2016); 26 U.S.C. 3231(e). But in the period when the RRTA was enacted, railroad employees enjoyed various noncash benefits that had no readily ascertainable value and (unlike stock options) were not as readily described as "money." See *Taxation of Interstate Carriers and Employees: Hearings on H.R. 8652 Before the House Comm. On Ways and Means*, 74th Cong., 1st Sess. 6, 9 (1935) (noting that railroad workers enjoyed "seniority" protections, protections of the Adamson law guaranteeing an eight-hour workday, and rights to "safety appliances"). To the extent that "money" was intended as a limiting term, it may have been used to exclude from tax *de minimis* in-kind benefits that cannot readily be described as "money."

The court of appeals' understanding of "compensation" is confirmed by Treasury Department regulations, which have defined the term broadly since immediately after the statute was enacted. See 26 C.F.R. 31.3231(e)-(1)(a) (current regulation generally aligning compensation under the RRTA with wages under FICA); 26 C.F.R. 410.5 (1938) (prior regulation defining compensation to include "something which may be used in lieu of money (scrip and merchandise orders, for example)"); see also *Black's Law Dictionary* 1061 (2d ed. 1910) (defining scrip to encompass shares in a public company); *Black's Law Dictionary* 1514 (4th ed. 1968) (same). It also accords with the Railroad Retirement

Board's interpretation of an identical definition of "compensation" in the corresponding benefits provision of the Railroad Retirement Act, 45 U.S.C. 231(h)(1). See 20 C.F.R. 211.2(a); Memorandum from Gen. Counsel, R.R. Ret. Bd., to Chief of Audit & Compliance, Bureau of Fiscal Operations 1 (Dec. 2, 2005).

This prevailing interpretation aligning the RRTA's treatment of options with the treatment of options under the parallel FICA scheme, see *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 573-575 (1979) (noting parallel remedial purposes of the railroad retirement system and Social Security), also avoids creating incentives to structure compensation through NQSOs to avoid employment taxes. Cf. *United States* v. *Silk*, 331 U.S. 704, 712 (1947) (explaining that a narrow construction of the remedial FICA statute "would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes * * * to avoid the immediate burdens at the expense of the benefits sought by the legislation").

2. The question presented implicates a circuit conflict that warrants resolution by this Court. Most courts that have considered the question have held that NQSOs qualify as compensation under the RRTA. See Pet. App. 1a-5a; *BNSF Ry.*, *supra*; see also *CSX Corp.* v. *United States*, No. 15-cv-427, 2017 WL 2800181 (M.D. Fla. May 2, 2017). The Eighth Circuit, however, reached a contrary conclusion in *Union Pacific*, *supra*. The Seventh Circuit denied petitioner's request for rehearing en banc in this case, and the Eighth Circuit denied the government's request for rehearing en banc in *Union Pacific*. See Pet. 14a-15a; 10/20/17 Order, *Union Pacific*, *supra* (No. 16-3574). The conflict therefore is

unlikely to be resolved without this Court's intervention.

The question presented is important to the administration of the federal tax laws. The present dispute concerns about $13 million, Pet. App. 20a, and pending and recently decided cases alone involve a total of nearly $100 million in taxes on income from stock-based compensation, *ibid.*; *Union Pac. R.R.* v. *United States*, 2016 U.S. Dist. Lexis 86023, at *2 n.2 (D. Neb. July 1, 2016) ($55 million), rev'd, 865 F.3d 1045, 1047 (8th Cir. 2017); *BNSF Ry.*, 775 F.3d at 747 (over $16 million); Compl. at 3, *CSX Corp.* v. *United States*, No. 17-cv-243 (M.D. Fla. Mar. 2, 2017) (over $12 million); Compl. at 3, *CSX Corp.*, *supra* (No. 15-427) (over $2.3 million). And because the Fifth and Eighth Circuits have reached conflicting results, the two largest railroad employers in the nation—BNSF and Union Pacific—now face different legal rules in their home circuits concerning an important issue of employee compensation. Because this case presents a significant legal question on which the courts of appeals are divided, and provides a suitable vehicle for resolving that disagreement, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2017

No. 17-530

In the Supreme Court of the United States

WISCONSIN CENTRAL, LTD., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether income realized by railroad employees upon the exercise of non-qualified stock options that petitioners granted to them in the course of employment is taxable "compensation" under the Railroad Retirement Tax Act, 26 U.S.C. 3231(e).

PARTIES TO THE PROCEEDING

The petitioners are Wisconsin Central, Ltd., Grand Trunk Western Railroad Company, and Illinois Central Railroad Company, all of which are subsidiaries of Canadian National Railway Company.

The respondent is the United States of America.

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In the Supreme Court of the United States

No. 17-530

WISCONSIN CENTRAL, LTD., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 856 F.3d 490. The order and opinion of the district court (Pet. App. 16a-42a) is reported at 194 F. Supp. 3d 728.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 2017. A petition for rehearing was denied on July 12, 2017 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on October 6, 2017, and was granted on January 12, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutes and regulations are reprinted in an appendix to this brief. App., *infra*, 1a-53a.

STATEMENT

1. a. The Railroad Retirement Tax Act (RRTA), 26 U.S.C. 3201 *et seq.*, funds a statutory program of retirement benefits for railroad employees through a tax on those employees' "compensation," defined as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. 3231(e)(1); see 26 U.S.C. 3201(a) and (b) (2012 & Supp. IV 2016).

In structure and purpose, the RRTA largely parallels the social security system, from which railroad employees are exempt. See 26 U.S.C. 3121(b)(9). Tier 1 of the RRTA taxes railroad employees' compensation at a rate identical to the rate at which non-railroad employees' wages are taxed to fund social security under the Federal Insurance Contributions Act (FICA), 26 U.S.C. 3101 *et seq.* See 26 U.S.C. 3201(a). Under the companion benefits statute, the Railroad Retirement Act of 1974 (RRA), 45 U.S.C. 231 *et seq.*, RRTA taxes are used to fund benefits identical to those provided under social security. 26 U.S.C. 3201(a), 3221(a); 45 U.S.C. 231b(a)(1). As in the social security system, taxes are pooled to fund all benefits, and the taxes paid by and on behalf of an employee do not necessarily correlate with the benefits that the employee later receives. *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 575-576 (1979). The RRTA also imposes an additional "Tier 2" tax, which funds benefits that are similar to a private pension. *Ibid.*; see 26 U.S.C. 3201(b), 3221(b) (Supp. IV 2016). An employee's Tier 2 benefits are linked to the amount of tax collected, investment returns, and years served in the railroad industry. *Ibid.*

Congress began work on the railroad-retirement system in the early 1930s before it created the social security program. Kevin Whitman, *An Overview of the Railroad Retirement Program*, 68 Soc. Sec. Bull. No. 2, at 41 (2008) (Whitman). Pension plans became widespread in the railroad industry before many other industries. *Ibid.* The railroad pension plans varied in their structure and funding mechanisms. See 2 Staff of the House Comm. on Interstate and Foreign Commerce and the Senate Comm. on Labor and Pub. Welfare, 92d Cong., 2d Sess., *The Railroad Retirement System: Analysis of its Historical Development, Statistical Trends, Structure, and Adequacy*, at 8-12 (Joint Comm. Print 1972) (Joint Committee Print); Murray Webb Latimer, *Industrial Pension Systems in the United States and Canada* 30-31 (1932); *Retirement Policies and the Railroad Retirement System*, S. Rep. No. 6, 83d Cong., 1st Sess. Pt. 1, at 64 (1953) (Douglas Report). But they were generally designed without "adequate financial and actuarial planning" and were severely underfunded. Joint Committee Print 15; see Whitman 41; see also, *e.g.*, *BNSF Ry. Co.* v. *United States*, 775 F.3d 743, 749-750 (5th Cir. 2015). When the Great Depression began, the "already unstable" plans spiraled into "a state of crisis," Whitman 41; see Joint Committee Print 16.

Congress responded to these problems by seeking to establish a financially stable pension system for railroad workers. Because the planned social security system would operate only prospectively and would not begin paying benefits for several years, Congress enacted separate railroad-retirement legislation. *BNSF*, 775 F.3d at 750. In 1934 and 1935, it enacted versions of the RRTA that were invalidated by courts applying pre-New-Deal understandings of Congress's powers

under the Commerce Clause and other constitutional provisions. *Railroad Ret. Bd.* v. *Alton R.R.*, 295 U.S. 330 (1935); *Alton R.R.* v. *Railroad Ret. Bd.*, 16 F. Supp. 955 (D.D.C. 1936); see *Hisquierdo*, 439 U.S. at 574 n.3. But the 1937 package of railroad-pension legislation that Congress enacted survived. That package included the Carriers Taxing Act of 1937, ch. 405, 50 Stat. 435, which as amended and renamed is today's RRTA, and an accompanying benefits statute, the Railroad Retirement Act of 1937, ch. 382, 50 Stat. 307, which forms the basis for today's RRA.

Shortly after those provisions were enacted, the Department of Treasury, which administers the RRTA, and the U.S. Railroad Retirement Board (Board), which administers the RRA, issued regulations and other guidance. In 1937, the Department of Treasury issued a regulation that construed taxable "compensation" under the RRTA as "all remuneration in money, or in something which may be used in lieu of money," and that offered as examples "scrip and merchandise orders." Treas. Reg. 100, Art 5 (1937); see 26 C.F.R. 410.5 (1938). That regulation remained in place until 1994. In that year, after numerous statutory amendments spanning 57 years had largely aligned the scopes of the RRTA and the FICA, the Department of Treasury issued a new regulation providing that, "except as specifically limited by the [RRTA] * * * or regulation," compensation under the RRTA "has the same meaning as the term wages in [FICA] section 3121(a)." 26 C.F.R. 31.3231(e)-1(a)(1). Subject to enumerated exceptions, the FICA defines "wages" as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." 26 U.S.C. 3121(a) (2012 & Supp. IV 2016).

Shortly after the RRTA and RRA were enacted, the Board issued a regulation providing that payment "in the form of a commodity, service, or privilege" would qualify as "compensation" under the RRA—whose definition of compensation is identical to the one contained in the RRTA—so long as the employer and employee agreed in advance that the employee's compensation would include the in-kind benefit and agreed in advance on the benefit's value. 20 C.F.R. 222.2 (1938). That regulation is still in effect. 20 C.F.R. 211.2(a). The year after the RRTA and RRA were enacted, the Board issued a legal opinion indicating that stock-based compensation could qualify as "money remuneration." Board G.C.M. L-38-440 (Apr. 22, 1938). The Board maintains that position today. Board G.C.M. L-2005-25, at 5-7 (Dec. 2, 2005).

Although Congress has enacted numerous amendments to the RRTA's definition of "compensation," it has left intact the definition's reference to "any form of money remuneration." Congress has created exemptions, however, for particular kinds of non-currency compensation. For example, Congress has exempted from RRTA taxation a particular kind of stock option—"incentive" or "[q]ualified" stock options, 26 U.S.C. 3231(e)(12)—which often receive favorable treatment under the tax code, and are generally defined in contradistinction to "nonqualified stock options" (NQSOs). Congress has also exempted particular types of in-kind benefits, such as employee achievement awards in the form of tangible personal property, 26 U.S.C. 3231(e)(5); certain meals and lodging, 26 U.S.C. 3231(e)(9); and health insurance, 26 U.S.C. 3231(e)(1)(i).

b. A stock option gives an employee the right to acquire company stock at a fixed price, known as the

"strike price," at a specified time or when specified conditions are met. *Black's Law Dictionary* 1268 (10th ed. 2014); see Pet. App. 2a-4a. The option has value when it is exercised if the strike price is lower than the market value of the stock. In that event, the value of the option is equal to the difference between the strike price and the market value of the stock at exercise. See Pet. App. 2a-4a.[1]

When an employee participating in petitioners' stock-option programs exercises an option, the employee can elect either to pay the strike price and receive the stock or to "have an agent exercise [the] employee's stock option, sell the shares of stock obtained by that exercise of the option, reserve part of the money received in the sale for taxes and administrative costs, and deposit the balance in the employee's bank account." Pet. App. 3a-4a. An employee who chooses the latter mechanism will "experience the stock option as a cash deposit." *Id.* at 4a.

Today, stock-based compensation like options often constitutes the lion's share of compensation for high-level executives. See Brian J. Hall & Jeffrey B. Liebman, *The Taxation of Executive Compensation*, in 14 Tax Pol'y & Econ. 4 (2000) (*Executive Compensation*) (describing predominant role of options in executive compensation); Lucian Bebchuk & Yaniv Grinstein, *The Growth of Executive Pay*, 21 Oxford Rev. of Econ. Pol'y No. 2, at 283-303 (2005) (*Growth of Executive Pay*) (same). That is true in the railroad industry. For ex-

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[1] Accordingly, for income-tax purposes, an employee who exercises an NQSO realizes as income the fair market value of the shares received, less the amount that the employee must pay for the shares. See 26 U.S.C. 83(a).

ample, Canadian National Railway Company, petitioners' parent company, paid its president more than $2 million in stock and more than $1.6 million in option-based awards in 2016, while paying him a salary of about $835,000.[2] In that same year, Union Pacific paid its CEO $1 million in salary, a $1.85 million bonus, and $7 million in stock and stock options.[3] CSX paid its CEO $1.2 million in salary and more than $8.6 million in stock awards and stock options.[4]

For many years, "railroads around the country, including petitioners," treated "non-qualified stock options" as "'money remuneration' under the RRTA and accordingly paid RRTA tax on" the value of the options exercised by the companies' employees. Pet. App. 36a (citation omitted); see *Union Pac. R.R.* v. *United States*, 2016 U.S. Dist. LEXIS 86023, at *4-*5 (D. Neb. July 1, 2016) (observing that Union Pacific issued stock options beginning in tax year 1981 and paid RRTA taxes on the options "without challenge" until filing a refund suit in 2014 concerning tax years 1991 to 2007), rev'd, 865 F.3d 1045 (8th Cir. 2017), petition for cert. pending, No. 17-1002 (filed Jan. 18, 2018). "[I]n recent years,"

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[2] Canadian Nat'l Ry. Co., *Management Information Circular* 55 (Apr. 2017), https://www.cn.ca/-/media/Files/Investors/Investor-Shareholder/information-circular-2017-en.pdf?la=en. Canadian National Railway's other high-ranking executives were also paid mostly in stock and stock options. See *ibid.*

[3] Union Pac. Corp., *Schedule 14A, 2017 Annual Meeting of Shareholders Proxy Statement* 54 (Mar. 2017), https://www.sec.gov/Archives/edgar/data/100885/000010088517000078/unp-20170329xdef14a.htm.

[4] CSX Corp., *Schedule 14A, 2017 Proxy Statement* 65 (Apr. 2017), https://www.sec.gov/Archives/edgar/data/277948/000120677417001259/csx3110061-def14a.htm.

however, several railroads have filed refund suits asserting that employees who exercise NQSOs do not receive taxable compensation under the RRTA because stocks are not a "form of money remuneration." Pet. App. 20a.

2. a. This is one of those suits. Petitioners are subsidiaries of Canadian National Railway Company and operate railroads in the United States. Pet. App. 17a; Pet. 7. Since 1996, petitioners have compensated some employees using NQSOs that permit those employees to acquire shares in the parent company, whose stock is traded on the New York Stock Exchange. *Id.* at 2a, 17a-18a; J.A. 37.

In 2014, petitioners filed suit against the federal government, seeking about $13 million in tax refunds. Pet. App. 20a; Pet. 9. They alleged that they had overpaid RRTA taxes by paying taxes on the income that their employees realized when they exercised their NQSOs. Pet. App. 2a, 17a, 20a. They sought refunds of the employer and employee portions of RRTA taxes that petitioners had paid on income from those options between 2006 and 2013. *Ibid.*

b. The parties filed cross-motions for summary judgment on stipulated facts, and the district court awarded summary judgment to the government. Pet. App. 17a-42a. The court applied the framework set out in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 20a. It found the phrase "any form of money remuneration" ambiguous as applied to compensation through stock options like NQSOs. The court noted that the government had cited dictionary definitions of "money" that encompassed such options, *id.* at 23a-24a (discussing *Oxford English Dictionary* and *Black's Law Dictionary*), while petitioners had cited definitions of "money"

that were narrower, *ibid.* (discussing *Oxford English Dictionary* and *Merriam-Webster Dictionary*).

The district court further explained that the express exclusion of certain types of stock options and of other non-cash benefits from the RRTA's definition of "money remuneration" supported the government's reading of the statute. Pet. App. 25a. The court observed that "Congress would have had no need to carve" out exceptions for qualified stock options and other non-cash compensation "if it did not consider" the things excepted to be a "form of money remuneration" in the first place. *Id.* at 27a-28a.

The district court also observed that the parallels between the RRTA and the FICA supported a construction of the RRTA that would give the statutes a similar reach. Pet. App. 30a-31a. The court further stated that "[c]ommon sense" supported treating the provision of stock options as money remuneration because "[s]tock options are financial instruments" that "are readily and regularly convertible into cash." *Id.* at 38a. The court also observed that this reading "eliminates the possibility that railroads could structure their compensation packages in such a way as to substantially reduce their RRTA tax burden." *Id.* at 39a.

c. The court of appeals affirmed. Pet. App. 1a-5a. The court held that the RRTA's definition of "compensation" encompasses "the value of stock options exercised by [petitioners'] employees." *Id.* at 2a; see *id.* at 2a-5a. The court rejected petitioners' argument that the phrase "any form of money remuneration" refers solely to cash and a narrow set of cash equivalents. *Id.* at 3a-4a. And it observed that stock today is the "practical equivalent" of cash. *Id.* at 4a.

The court of appeals explained that the RRTA's exclusion for qualified stock options "supports an inference that *non-qualified* stock options, which are the options at issue in this case, are covered by the term 'money remuneration' and are therefore taxable." Pet. App. 4a-5a. The court found that conclusion to be "reinforce[d]" by the statutory exceptions for other types of non-cash benefits, like health care, employee achievement awards of tangible property, and certain meals and lodging. *Id.* at 5a. The court explained that the government's position also made "practical sense" because it avoids "the creation of a tax incentive that might distort the ways in which employers structure compensation packages." *Ibid.* And it observed that its reading accorded with other decisions addressing the classification of stock options under the RRTA. *Ibid.* (citing *BNSF*, 775 F.3d at 757; *CSX Corp.* v. *United States*, No. 15-cv-427, 2017 WL 2800181 (M.D. Fla. May 2, 2017), appeal pending, No. 17-12961 (11th Cir. docketed June 6, 2017).

Judge Manion dissented. Pet. App. 5a-13a. In his view, the term "money remuneration" unambiguously excludes compensation through stock options. *Id.* at 7a-9a. He found irrelevant the statutory exclusions from "compensation" for qualified stock options and other non-cash remuneration, principally on the ground that those exclusions had been added to the RRTA years after Congress enacted the statute's basic definition of RRTA "compensation." *Id.* at 10a-12a.

SUMMARY OF ARGUMENT

Petitioners' compensation of employees in publicly traded stock through NQSOs constitutes taxable compensation under the RRTA.

A. The RRTA defines taxable "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee," and then sets out numerous exclusions, including exclusions for a particular type of stock option and for specified types of in-kind benefits. 26 U.S.C. 3231(e). Under the RRTA's definition of taxable "compensation," remuneration of an employee through publicly traded stock is taxable.

1. The phrase "any form of money remuneration" encompasses payments in publicly traded stocks. Dictionaries around the time of the RRTA's enactment often defined "money" as encompassing property, such as stock, that can be readily valued or converted to currency. Petitioners emphasize that "money" was also used in a narrower sense as referring to any "medium of exchange." But publicly traded stocks fit that definition as well. Stocks were used as a medium of exchange in corporate and employee-compensation matters when the RRTA was enacted, and today, they are the predominant medium of exchange in some employee-compensation and business contexts. That widespread use reflects that stock today functions as the "practical equivalent" of currency. Pet. App. 4a. Indeed, railroad employees who exercise stock options can simply opt to have the value of their options (less taxes and fees) deposited into their bank accounts as cash. *Id.* at 3a-4a.

The question whether "money" can encompass stock often arose in judicial decisions around the time of the RRTA's enactment when courts interpreted wills that conveyed "money." Courts recognized that "money" was a flexible term with broader and narrower meanings, and they often held that conveyances of "money" encompassed stocks and similar instruments—even

though at the time of the RRTA's enactment, such instruments were less liquid and less widely used as mediums of exchange than today. Statutory definitions of "money" that encompass stock also confirm that "money" can be understood to reach such instruments.

2. The statutory carve-outs from the RRTA's basic definition of "compensation" confirm that "any form of money remuneration" includes payments to employees in publicly traded stocks. Especially relevant is the carve-out for qualified stock options. That exception would be unnecessary if stock-based compensation was not "money remuneration" to begin with. Petitioners' view would also render wholly or partially superfluous the RRTA carve-outs for in-kind benefits such as employer-provided meals and lodging, employee achievement awards in the form of tangible property, and employer-provided health and disability insurance.

B. Historical practice also indicates that payments in stock qualify as taxable compensation under the RRTA.

1. Congress first defined "compensation" as "any form of money remuneration" in 1935 railroad-retirement legislation that consisted of tax and benefits statutes paralleling the RRTA and RRA. Early versions of the 1935 benefits statute defined "compensation" as "[a]ny form of money remuneration for active service received by an employee from a carrier, including salaries, commissions, and the reasonable value of board, rents, lodging, and other similar advantages furnished for subsistence of the employee while in service," while excluding "the value of such boards, rents, housing, lodging, and other similar advantages combined which is less than $10 for any calendar month," in addition to "free transportation." S. 2862, 74th Cong., 1st Sess., § 1(e), at 3 (1935) (defining "compensation"); see H.R. 8121, 74th

Cong., 1st Sess., § 1(e), at 3 (1935). The 1935 Congress ultimately enacted a simpler definition of "compensation," which omitted illustrative examples of money remuneration and the carve-out for certain smaller-value in-kind benefits. But the proposed bills demonstrate an understanding that "any form of money remuneration" naturally includes readily-valued in-kind compensation.

In addition, the RRTA and RRA predecessors that Congress did enact in 1935 defined compensation as "any form of money remuneration," but then expressly excluded "free transportation." That exclusion reflects, at minimum, Congress's understanding that "any form of money remuneration" could be read to reach railroad workers' transportation privileges if no exclusion existed.

2. Agency interpretations that have been ratified by Congress reflect the understanding that RRTA compensation includes stock. In 1937, the Department of Treasury issued a regulation defining "compensation" in the RRTA to include "all remuneration in money" as well as "something which may be used in lieu of money (scrip or merchandise orders, for example)." 26 C.F.R. 410.5 (1938); Treas. Reg. 100, Art. 5 (1937). "Scrip" at the time of the RRTA's enactment principally referred to certificates of stock ownership.

In addition, the Board issued regulations construing the identical definition of compensation in the RRA as including certain in-kind benefits with readily ascertainable values. The Board's 1938 regulations provided that "amounts to be paid in the form of a commodity, service, or privilege" qualified as "compensation" so long as the employer and employee had agreed in advance that part of the employee's compensation would

be paid "in the form of such commodity, service, or privilege" and had agreed "upon the value of such commodity, service, or privilege." 20 C.F.R. 222.2 (1938). The Board also issued an opinion in 1938 determining that stock can qualify as money remuneration. Board G.C.M. L-38-440, at 2.

These contemporaneous interpretations constitute evidence of the original public meaning of "money remuneration" under the RRTA and RRA. In the ensuing years, Congress has enacted numerous amendments to the RRTA and RRA without altering or calling into question the agencies' determination that non-cash benefits like stock can constitute "money remuneration." Under these circumstances, "the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986) (citation omitted).

C. Treating payments of publicly traded stock as taxable "compensation" under the RRTA furthers the statute's objectives. The RRTA and RRA were enacted to provide a financially stable, self-sustaining system of retirement benefits for railroad workers. As this Court has explained in the context of social security, the aim of providing a financially sound and self-sustaining pension system counsels against "constricted interpretation of the phrasing" of the applicable taxing statute, because such interpretation would "invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation." *United States* v. *Silk*, 331 U.S. 704, 712 (1947). That reasoning applies here. Construing "any form of money remuneration" to exclude highly liquid cash substitutes would enable employers

to "avoid the immediate burdens" of RRTA taxation, at the expense of adequately funding retirement benefits. *Ibid.*

D. Regulations reinforce that RRTA "compensation" includes compensation in publicly traded stocks. Since 1994, Department of Treasury regulations have provided that "compensation" in the RRTA "has the same meaning as the term wages" in the FICA, "except as specifically limited by the [RRTA]" or by regulation. 26 C.F.R. 31.3231(e)-(1)(a) (emphasis omitted). In adopting that rule, the agency emphasized that decades of statutory amendments had brought the FICA and the RRTA together, including by "conforming the structure of the RRTA to parallel that of the FICA." 59 Fed. Reg. 66,188 (Dec. 23, 1994). Since NQSOs are taxable under the FICA, and not specifically excluded from taxation under the RRTA, the regulation supports the conclusion that income from NQSOs is taxable under the RRTA.

The Board's longstanding regulation defining "compensation" under the RRA also undermines petitioner's claim that stock options are not taxable "compensation." Since 1938, the Board has construed "any form of money remuneration" to encompass payments in the form of a "commodity, a service, or a privilege." 20 C.F.R. 211.2(a). That definition is inconsistent with petitioners' contention that "money remuneration" encompasses only payments in the types of mediums of exchange that are used for everyday purchases.

ARGUMENT

An employer's provision to an employee of publicly traded stock through an NQSO is taxable "compensation" under the RRTA.

A. The RRTA's Definition Of Taxable "Compensation" Encompasses An Employer's Provision Of Publicly Traded Stock

The RRTA defines taxable "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee," and then sets out numerous exclusions from that definition, including exclusions for income from a particular type of stock option and for various in-kind benefits. 26 U.S.C. 3231(e). Petitioners argue that their employees do not receive taxable "compensation" under the RRTA when they receive stock through NQSOs because stock is not a "form of money remuneration." But dictionary definitions of "money" encompass stock, which is readily convertible to currency and serves as a common medium of exchange in business transactions. And the RRTA's exclusions, including the exclusion for income from certain stock options, reinforce the conclusion that the RRTA's definition of compensation reaches the stock-based compensation here.

1. The phrase "any form of money remuneration" encompasses an employer's provision of publicly traded stock

a. i. Dictionaries from the 1930s contain both broader and narrower definitions of "money." The broader definitions encompass forms of property, including stock, that can be readily valued or converted into currency. See, *e.g.*, 6 *The Oxford English Dictionary* 603 (1931) (reprinted 1978) ("property or possessions of any kind viewed as convertible into money or having value expressible in terms of money"); *Black's Law Dictionary* 1200 (3d ed. 1933) ("the representative of commodities of all kinds * * * and of everything that can be transferred in commerce"); 1 *The New Century*

Dictionary of the English Language 1063 (1933) ("property considered with reference to its pecuniary value"); *Webster's New International Dictionary* 1583 (2d ed. 1934) (*Webster's Second*) ("capital considered as a cash asset; specif[ically] such wealth or capital dealt in as a commodity to be loaned, invested, or the like"). "Money" is still used in that way today. See, *e.g.*, *Webster's Third New International Dictionary* 1458 (1993) ("assets or compensation in the form of or readily convertible to cash"); *Black's Law Dictionary* 1021 (7th ed. 1999) ("[a]ssets that can be easily converted to cash"). The RRTA's inclusive reference to "any form of money remuneration" further indicates that Congress intended to reach all forms of compensation that can be described as money. See *United States* v. *Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 7 (2008) (use of "any" signaled that "Congress meant the statute to have expansive reach").

Petitioners suggest (Br. 28-29) that this common definition of "money" renders the term superfluous in the context of the RRTA. To be sure, the word "money" is sometimes used in a manner that adds no independent meaning (as in the phrase "money damages"). See *BNSF Ry.* v. *United States*, 775 F.3d 743, 753 & n.72 (5th Cir. 2015); see also Bryan A. Garner, *A Dictionary of Modern Legal Usage* 571 (2d ed. 1995). But as the court below noted, "money" serves a limiting function in the RRTA context, Pet. App. 3a, by confining taxable "compensation" to payments or benefits that can be easily valued in or converted to cash.

At the time the RRTA was enacted, that limitation performed an especially significant role in the context of the railroad industry. When Congress was considering railroad pension legislation, railroad workers were

known to have special employment advantages and fringe benefits that could not be readily assigned a cash value. See *Taxation of Interstate Carriers and Employees: Hearings on H.R. 8652 Before the House Comm. on Ways and Means*, 74th Cong., 1st Sess. 6, 9 (1935) (*H.R. 8652 Hearings*) (describing seniority protections, guarantees of an eight-hour workday, lifetime transportation privileges, and rights to safety appliances); *Taxation of Interstate Carriers and Employees: Hearings on S. 3150 Before Senate Comm. on Finance*, 74th Cong., 1st Sess. 4, 23 (1935) (same). After the RRTA was enacted, the Board determined that in-kind compensation in the form of a "commodity, service, or privilege" would qualify as money remuneration only if the employment agreement established the value of the benefit. 20 C.F.R. 222.2 (1938); see pp. 38-41, *infra* (discussing the Board's interpretation of "any form of money remuneration").

When a statutory definition is itself ambiguous, "it is not unusual to consider the ordinary meaning of a defined term" as one factor bearing on the resolution of that ambiguity. *Bond* v. *United States*, 134 S. Ct. 2077, 2091 (2014). An employer's provision of stock or stock options in return for an employee's labor falls in the heartland of the usual understanding of the term "compensation." See, *e.g.*, *Black's Law Dictionary* 342 (10th ed. 2014) (first definition of "compensation" is "[r]emuneration and other benefits received in return for services rendered; esp., salary or wages"). That usual understanding of the defined term, like other aspects of the statutory context in which the definition appears, bears on the appropriate reading of "money remuneration" in the definitional provision. See *Johnson* v. *United States*, 559 U.S. 133, 140 (2010).

ii. As petitioners observe (Br. 3, 16, 20-21), the term "money" is also used in a narrower sense to refer to a "medium of exchange." See, *e.g.*, *Webster's Second* 1583 ("[a]nything customarily used as a medium of exchange and measure of value, as sheep, wampum, copper rings, quills of salt, or of gold dust, shovel blades, etc."); see also Henry Cecil Wyld, *The Universal Dictionary of the English Language* 741 (1932) ("Any recognized medium of exchange and measure of value"); *Bouvier's Law Dictionary* 814 (Baldwin's Student ed. 1934). But stock in publicly traded companies falls within even this narrower definition. When the RRTA was enacted, stocks were already used as a medium of exchange in the corporate transactions and employee-compensation matters that are the RRTA's focus. See, *e.g.*, *Bonham* v. *Commissioner*, 89 F.2d 725 (8th Cir. 1937) (corporate transaction); *Prescott* v. *Commissioner*, 76 F.2d 3 (5th Cir. 1935) (same); see also *Commissioner* v. *Smith*, 324 U.S. 177 (1945) (employee compensation); *Chaplin* v. *Commissioner*, 136 F.2d 298 (9th Cir. 1943) (same). Consistent with that use, the legal dictionary that petitioners invoke for the principle that money refers to "'common medium[s] of exchange in a civilized nation,'" Pets. Br. 22, states that "[f]or many purposes bank notes; treasury notes and national bank notes * * * negotiable notes; securities; and bonds; will be considered as money," *Bouvier's Law Dictionary* 814 (citations omitted).

Publicly traded stocks are an even more common medium of exchange now than they were when the RRTA was enacted. "Today, nearly all top executives of large companies receive stock options, and the average stock-option grant is now larger for most top executives than salary and bonus combined." *Executive Compensation*

4; *Growth of Executive Pay* 283-303. Stock-based compensation plays that role in the railroad industry, forming the bulk of compensation for the top officials at petitioners' parent company and at other leading railroads. See pp. 6-7, *supra*. And stock is now the most common medium of exchange in other types of business transactions as well. See, *e.g.*, Gregor Andrade et al., *New Evidence and Perspectives on Mergers*, 15 J. Econ. Perspectives 103, 105-106 (Spring 2001) (determining that "[a]bout 70 percent of all deals in the 1990s involved stock compensation, with 58 percent entirely stock financed").

Those practices amply support the court of appeals' characterization of publicly traded stock as the "practical equivalent" of currency. Pet. App. 4a. Indeed, under petitioners' stock-option program and many others, employees exercising options can elect simply to have cash deposited to their bank accounts and thereby "experience the stock option as a cash deposit." *Id.* at 3a-4a. "Approximately 90-95% of the time," for instance, BNSF Railway employees exercising stock options would "sell the share at the same time, such that the employee would only receive the difference between the strike price and the exercise price." *BNSF*, 775 F.3d at 747. Among CSX employees, the figure was 93%. *CSX Corp.* v. *United States*, No. 15-cv-427, 2017 WL 2800181, at *2 (M.D. Fla. May 2, 2017), appeal pending, No. 17-12961 (11th Cir. docketed June 6, 2017). Petitioners' apparent position is that their stock-option programs will not result in "money remuneration" even when an employee chooses the cash-deposit mechanism rather than taking ownership of the stock. Acceptance of that position would elevate form over substance and create an obvious avenue for circumvention of the RRTA tax.

Petitioners suggest (Br. 24) that the RRTA's definition of "compensation" cannot encompass stock because stock would not have been viewed as "money" when the statute was enacted. But that argument would lack merit even accepting the narrow medium-of-exchange definition that petitioners posit, both because stock was sometimes used as a medium of exchange even in 1937, see p. 19, *supra*, and because "the instruments that comprise" mediums of exchange can "change over time," Pet. App. 4a. Indeed, petitioners acknowledge that some methods of compensation qualify as "money remuneration" today even though they would have been unknown to a Depression-era railroad worker. Pets. Br. 23-24 (discussing "wire transfers, electronic direct deposits, and so forth").

Petitioners also suggest (Br. 23) that publicly traded stocks are not a "medium of exchange" today because they are not used for everyday transactions such as buying groceries or paying rent. In construing the RRTA, however, the more pertinent fact is that stock is often used as a medium of exchange for employee compensation and business transactions. In any event, the term "money remuneration" cannot reasonably be construed as limited to forms of compensation that can be directly exchanged for goods or services. For example, an employee generally cannot hand over a paycheck to buy groceries or pay rent, yet petitioners accept (*ibid.*) that such bank drafts constitute "money remuneration."

b. During the era in which the RRTA was enacted, the question whether the term "money" encompassed stock often arose when courts interpreted wills that conveyed "money." Courts during that period treated the term "money" as "essentially ambiguous" because it

could be used "in its narrow sense as cash" but was "often given a broader and more elastic meaning." George W. Thompson, *The Law Of Wills And The Manner Of Their Drafting, Execution, Probate And Interpretation* § 245, at 318 (2d ed. 1936) (summarizing and collecting cases). Those courts understood that as a result of the "degree of flexibility in [money's] popular meaning," the term's proper construction in a particular will depends on the context in which the term appears. *Mt. Holly Safe Deposit & Trust Co.* v. *Deacon*, 81 A. 356, 357 (N.J. Ch. 1911); see *McCullen* v. *Daughtrey*, 129 S.E. 611, 613 (N.C. 1925); *Paul* v. *Bell*, 31 Tex. 10, 10 (1868); see also E. S. Oakes, Annotation, *What included in term 'money' in will*, 93 A.L.R. 514 (1934) (compiling decisions treating "money" as "a term of flexible meaning, having either a restricted or wide signification"). In a 1921 decision construing a court rule, the Seventh Circuit similarly explained that "'[m]oney' is a broader and more generic term" than "cash," and that it "may include not only legal tender, coin, or currency, but also any other * * * instruments or tokens in general use in the commercial world as representatives of value"—a category that the court determined included U.S. bonds. *McGovern* v. *United States*, 272 F. 262, 263.

Courts in the years before the RRTA's enactment thus recognized that the term "money" often encompassed stocks and similar instruments, even though stock was then less liquid and less widely used as compensation than it is today. See, *e.g.*, *Mutual Life Ins. Co.* v. *Spohn*, 188 S.W. 1078, 1078 (Ky. 1916) (stating that "'money' is often used in wills in a broad and elastic sense" to encompass "ground rents, bonds and notes," among other interests); *Smith* v. *Burch*, 92 N.Y. 228, 231-232 (1882) ("[T]he word 'money' has sometimes

been held to include securities [and] stocks."); *Perkins* v. *Mathes*, 49 N.H. 107, 111 (1869) ("[B]onds, bank stock, deposit notes and promissory notes have often been held to pass under the term 'moneys' in a will."); *Fulkerson* v. *Chitty*, 57 N.C. (4 Jones Eq.) 244, 245 (1858) (per curiam) (stating that it "cannot admit of any doubt" that "money" may "include stock in a bank, or in the public funds," and further concluding that "notes and bonds may be included in that term"). Accordingly, a number of decisions construed conveyances of "money" to convey stocks and similar instruments. See, *e.g.*, *Industrial Trust Co.* v. *Saunders*, 42 A.2d 492, 494-495 (R.I. 1945) (stock); *Lane* v. *Railey*, 133 S.W.2d 74, 79 (1939) (stocks and bonds); *Gandy* v. *Stanton*, 157 A. 894, 896 (N.J. Ch. 1931) (stock in building and loan associations); *Baldwin* v. *Baldwin*, 151 A. 741, 742 (N.J. Ch. 1930) (stock in a building and loan association and utility company); *Hinkley* v. *Primm*, 41 Ill. App. 579, 581-582 (Ill. App. Ct. 1892) (securities consisting of bonds and promissory notes); *Jenkins* v. *Fowler*, 63 N.H. 244, 246 (1884) (railroad stock).

Even decisions that petitioners invoke (Br. 22, 24), which adopted narrower readings of the term "money" in particular contexts, recognized that the term *could* extend to liquid assets such as publicly traded stocks. Petitioners cite (Br. 24) *In re Boyle's Estate*, 37 P.2d 841, 842 (Cal. Dist. Ct. App. 1934), for its statement that the "ordinary" meaning of "money" does not reach stocks. The court in that case further observed, however, "that the word 'money' has been given a broader significance under certain circumstances." *Ibid.* In concluding that stock fell outside the conveyance of "money" in the will at hand, the court explained that the

will as a whole established the decedent's intent to include corporate stocks in the portion of the will addressing "all my personal property." *Ibid.* The court in *In re Hokulani Square*, 776 F.3d 1083 (9th Cir. 2015), on which petitioners also rely (Br. 22), similarly recognized that "[t]here are numerous ways to define 'moneys.'" 776 F.3d at 1085. It concluded that real estate was not "money" based on such property's "highly illiquid" nature, *id.* at 1086—an attribute that publicly traded stocks do not possess.

The two decisions of this Court on which petitioners rely (Br. 24-25) are also consistent with the understanding that the term "money" sometimes encompasses stock. See *ibid.* (discussing *Helvering* v. *Credit Alliance Corp.*, 316 U.S. 107 (1942), and *Commissioner* v. *LoBue*, 351 U.S. 243 (1956)). In neither case did the Court interpret a statute or instrument that used the term "money." See *Credit Alliance Corp.*, 316 U.S. at 109, 112 (concluding that dividends paid to a parent company qualified for tax credits under a provision of the tax code governing "amounts distributed in liquidation") (citation omitted); *LoBue*, 351 U.S. at 247 (concluding that stock distributions were taxable income under a definition reaching "income derived from compensation in 'whatever form paid'"). In the course of its analysis, however, the Court in each case referred to "stocks" on the one hand and "money" on the other. See *Credit Alliance Corp.*, 316 U.S. at 112 (describing a statutory provision that governed the tax treatment of stocks as "irrelevant to this controversy, because the distribution here was in property and money, not in stock or securities"); *LoBue*, 351 U.S. at 247 ("It makes no difference that the compensation is paid in stock rather than in money.").

Those statements are consistent with the understanding that "money" has both broader and narrower meanings. When "stock" is used in contradistinction to "money," context establishes that "money" is used in its narrower sense. As explained above, however, courts at the time of the RRTA's enactment often construed "money" to encompass stocks and other non-currency property when context supported that reading.

c. Congress has enacted statutory definitions that also reflect that "money" can encompass stock. Section 731(c)(1)(A) of Title 26 of the U.S. Code states that, for purposes of certain tax-law provisions, "the term 'money' includes marketable securities." The federal money-laundering statute forbids certain transactions in "monetary instruments" and defines "monetary instruments" to include "investment securities." 18 U.S.C. 1956(c)(5)(ii). While petitioners point to other provisions (Br. 31-32) that use the term "stock" in contradistinction to "money," those provisions are again consistent with the proposition that "money" has both broader and narrower uses.[5]

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[5] Amicus Norfolk Southern Corporation suggests (Br. 13-16) that a narrow definition of "any form of money remuneration" is supported by a regulation that defines "cash remuneration" in a portion of FICA concerning domestic and agricultural employees, 26 U.S.C. 3121(a)(7) and (8), as limited to cash, checks, and monetary media of exchange, see 26 C.F.R. 31.3121(a)(8)-1(f). That regulation interprets a statutory provision that is materially different from the one at issue here because it concerns "cash remuneration," which is statutorily defined to exclude "remuneration paid in any medium other than cash." 26 U.S.C. 3121(a)(7) and (8). In addition, that statutory provision is part of a framework governing agricultural and domestic employees that is different in many respects from the RRTA's framework governing railway workers.

2. The exclusions contained in the RRTA's definition of "compensation" reinforce the conclusion that "any form of money remuneration" includes publicly traded stock

a. It is a "cardinal rule" of statutory interpretation "that statutory language must be read in context, since a phrase gathers meaning from the words around it." *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004) (brackets and citation omitted); see, *e.g.*, *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004). "The rule against superfluities complements [th]is principle" by directing that "'[a] statute should be construed so that effect is given to all its provisions,'" and "'no part will be inoperative or superfluous, void or insignificant.'" *Hibbs*, 542 U.S. at 102 (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 46.06, at 181, 186 (6th rev. ed. 2000)).

Those principles counsel that definitions should be construed in a manner that gives their exceptions substantive effect. Accordingly, in determining that the FICA term "wages" encompasses severance payments, this Court relied in part on a later-enacted exception that covered certain types of termination-related pay. *United States* v. *Quality Stores, Inc.*, 134 S. Ct. 1395 (2014). The Court explained that the "specific exemption under FICA for certain termination-related payments" was evidence that severance payments "are well within the definition of wages" because the exception "would be unnecessary were severance payments in general not within FICA's definition of 'wages.'" *Id.* at 1400. Similarly, in *American Bank & Trust Co.* v. *Dallas County*, 463 U.S. 855, 864 (1983), this Court declined to read a statute in a manner that would cause "specific exceptions" to be "superfluous."

The express statutory carve-outs from the RRTA's definition of "compensation" reinforce the inference that "any form of money remuneration" includes publicly traded stock. Especially relevant is the carve-out for qualified stock options.[6] The RRTA specifies that "[t]he term 'compensation' shall not include any remuneration on account of * * * a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option * * * or under an employee stock purchase plan." 26 U.S.C. 3231(e)(12)(A). That exception "would be unnecessary," *Quality Stores*, 134 S. Ct. at 1400, if compensation in stock was not "money remuneration" to begin with. The exception for qualified stock options thus indicates "that *non-qualified* stock options"—the type at issue in this case—"are covered by the term 'money remuneration' and are therefore taxable." Pet. App. 4a-5a.

Other carve-outs from "compensation" include employee achievement awards in the form of tangible personal property, 26 U.S.C. 3231(e)(5); certain "meals or lodging furnished by or on behalf of the employer," 26 U.S.C. 3231(e)(9); and payments made by an employer for health and disability insurance, 26 U.S.C. 3231(e)(1)(i). Those exceptions would also be superfluous in whole or in part if the RRTA's basic definition of

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[6] Qualified stock options, or incentive stock options, are a class of options that often receive favorable treatment under the Internal Revenue Code, but are subject to stringent limitations. For instance, the Internal Revenue Code caps the amount of compensation that individuals may receive through qualified stock options in a calendar year, imposes certain holding requirements on the shares, and requires shareholder approval to issue such options. See 26 U.S.C. 422.

"compensation" excluded all non-cash remuneration. See Pet. App. 5a; see also *BNSF*, 775 F.3d at 754.

b. Petitioners' efforts to reconcile the various statutory carve-outs with their narrow understanding of "money remuneration" are unavailing.

i. Petitioners suggest (Br. 34) that the carve-outs from "compensation" should be disregarded because "[t]he meaning of the term 'money remuneration' was fixed in 1937 and subsequent amendments cannot change that meaning absent an express or implied repeal." They argue, in particular, that the amendments adding exceptions to the RRTA's definition of "compensation" are irrelevant in construing that term because the later enactments do not meet the standard for implied repeal of an earlier provision. See Pets. Br. 34-35.

Contrary to petitioners' argument, later-enacted statutory language can clarify the meaning of pre-existing provisions even if the later enactment does not impliedly repeal the earlier one. The "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *United States* v. *Fausto*, 484 U.S. 439, 453 (1988). Thus, "[w]here a statutory term presented to [this Court] for the first time is ambiguous," the Court adopts the "permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law." *West Va. Univ. Hosps.* v. *Casey*, 499 U.S. 83, 100-101 (1991). Reconciling statutes in this way is not tantamount to an implied repeal. See *United States* v. *Estate of Romani*, 523 U.S. 517, 530 (1998) ("Given the fact that this basic question of interpretation [of a 1797 statute] remains unresolved, it does not seem appropriate to

view the issue in this case as whether the Tax Lien Act of 1966 implicitly amended or repealed the priority statute. Instead, we think the proper inquiry is how best to harmonize the impact of the two statutes.").

ii. Petitioners also argue that the RRTA exceptions would retain some minimal practical effect even under their narrow construction of the term "money remuneration." Petitioners' approach fails to make sense of the qualified-stock-option exception and would render multiple in-kind benefit exceptions either wholly or partially superfluous.

A. Petitioners observe (Br. 37) that employees sometimes receive cash payments from their employers at the same time the employees exercise stock options. But the RRTA's exception for remuneration "on account of * * * the transfer of a share of stock pursuant to an exercise of an incentive stock option," 26 U.S.C. 3231(e)(12), is not naturally read to exempt from RRTA tax every cash payment that an employee receives contemporaneously with the exercise of a stock option. The regulation that petitioners cite (Br. 37) simply provides that "[a]n option does not fail to be an incentive option merely because the optionee has the right to receive additional compensation, in cash or in property, when the option is exercised." 26 C.F.R. 1.422-5(c). The regulation thus ensures that qualified stock options do not lose their special tax status by virtue of accompanying payments, but it does not exempt the cash payments themselves from RRTA taxation.

Petitioners more modestly hypothesize (Br. 37) that the qualified-stock-option exception could have been intended to exempt a particular, narrow class of cash payments: payments made "in lieu of a fractional share" of stock when an option is exercised. When a business that

issued an option is acquired by another company or undertakes a "reverse stock split," see *Black's Law Dictionary* 1585, 1645 (10th ed. 2014), employees holding already issued options can sometimes wind up with an option for a fractional share of stock. In lieu of the fractional interest, an employer may simply pay the employee the value of the fractional share in cash.

Petitioners' fractional-share account is not a plausible account of this statutory exception, however. Under the applicable interpretive canon, courts seek to avoid constructions that render statutory exceptions "largely superfluous"—not simply those that render them total nullities. *Arkansas Best Corp.* v. *Commissioner*, 485 U.S. 212, 218 (1988) (rejecting reading of a tax statute that would be "in tension with [enumerated] exceptions" because the taxpayer's reading would render the exclusions "largely superfluous"); *American Bank & Trust Co.*, 463 U.S. at 864. "When Congress acts to amend a statute," this Court "presume[s] it intends its amendments to have real and substantial effect." *Quality Stores*, 134 S. Ct. at 1401 (quoting *Stone* v. *INS*, 514 U.S. 386, 397 (1995)). Reading the broadly worded language of 26 U.S.C. 3231(e)(12) to reach only small cash payments in lieu of fractional shares is not consistent with that principle.

Other evidence further belies petitioners' suggestion that the qualified-stock-option carve-out was designed to reach accompanying cash payments. When Congress enacted the RRTA exception for qualified stock options, it added an identically worded exception to the definition of taxable "wages" under the FICA. The undisputed purpose and effect of that FICA exception was to exempt the income realized from the options themselves —income that would otherwise fall within the FICA's

definition of taxable "wages." There is no reason to suppose that the identically worded RRTA provision had a fundamentally different purpose.

The bill creating parallel exclusions for qualified stock options in the FICA and the RRTA was understood as creating "a conforming exclusion for employment taxes" to the treatment of qualified stock options under the income tax code, which already had "a specific income tax exclusion with respect to [qualified] stock options." H.R. Rep. No. 548, 109th Cong., 2d Sess. Pt. 1, at 145 (2004); see Staff of the Joint Comm. on Taxation, 109th Cong., 1st Sess., *General Explanation of Tax Legislation Enacted in the 108th Congress* 218-219 (Joint Comm. Print 2005) (*General Explanation*) (qualified-stock-option exception was designed to replicate the favorable tax treatment of qualified stock options under the income-tax laws). The Joint Committee print explained that the FICA exception clarified that such options would not be taxed under the FICA, *General Explanation* 219, and that the RRTA exception "provide[d] a similar exclusion under the Railroad Retirement Tax Act," *id.* at 219 n.378. The only understanding that accords with the statutory text, the rule against superfluities, history, and common sense is that the carveout for qualified stock options was enacted to exclude from taxable "compensation" a particular type of stock option that would otherwise be taxable.

B. Numerous other exclusions from the RRTA's definition of "compensation" likewise reflect the premise that non-cash remuneration easily convertible into currency can be a "form of money remuneration."

For example, "item[s] of tangible personal property" that are given as awards for employee achievement are exempt from RRTA taxation. 26 U.S.C. 274(j)(3)(A);

see 26 U.S.C. 3231(e)(5) ("The term 'compensation' shall not include any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c)"); see also 26 U.S.C. 74(c) ("Gross income shall not include the value of an employee achievement award (as defined in section 274(j))."). On petitioners' reading of the statute, this exception would be unnecessary, because petitioners' narrow definition of "money remuneration" would not reach awards of tangible personal property.

Amici CSX Corporation et al. suggest (Br. 9) that this exception would retain meaning under petitioners' view because it would exempt the subset of "gift certificates" that are "akin to credit cards and usable at a variety of retailers." But a certificate of that type is not readily described as an item of "tangible personal property" at all, and the Department of Treasury has for decades foreclosed such a reading. See 26 C.F.R. 1.274-3(b) (1990) (providing that "'tangible personal property' does not include cash or any gift certificate other than a nonnegotiable gift certificate conferring only the right to receive personal property"). Congress recently codified that interpretation. 26 U.S.C. 274(j)(3)(A)(ii) (specifying that "'tangible personal property' shall not include "cash, cash equivalents, gift cards, gift coupons, or gift certificates (other than arrangements conferring only the right to select and receive tangible personal property from a limited array of such items pre-selected or pre-approved by the employer)").

In any event, it is not plausible that Congress added a broad exclusion for awards of "tangible personal property" to the RRTA in order to capture only awards in-

volving a narrow subspecies of gift certificates. See *Arkansas Best Corp.*, 485 U.S. at 218 (exceptions should not be construed in a manner that would render them "largely superfluous"); *Quality Stores*, 134 S. Ct. at 1401. Moreover, CSX offers no reason why Congress would make employee achievement awards taxable under the RRTA when paid in currency, but enact an exception for such awards in one particular currency equivalent: gift certificates that are "akin to credit cards and usable at a variety of retailers." CSX Amicus Br. 9.

Petitioners' narrow interpretation of "money remuneration" would likewise create superfluity in the RRTA exclusion for employer-provided meals and lodging. That exclusion states that "[t]he term 'compensation' shall not include the value of meals or lodging furnished by or on behalf of the employer," so long as "it is reasonable to believe that the employee will be able to exclude such items from income under section 119," which sets out categories of excludable meals and lodging. 26 U.S.C. 3231(e)(9); see 26 U.S.C. 119. Like employee achievement awards of tangible personal property, the meals and lodging that Section 3231(e)(9) exempts would not constitute "money remuneration" under petitioners' interpretation of that term.

To identify some circumstance in which the exception would do work under their interpretation, petitioners point (Br. 38-39) to a single subsection of Section 119, the meal-and-lodging provision that is cross-referenced in the RRTA exclusion. That subsection allows an employee to exclude from taxable income under specified circumstances fees that the employee must pay the employer "on a periodic basis" as "a fixed charge for his meals." 26 U.S.C. 119(b)(3)(A). But it would be strange for Congress to enact a broadly worded exception for

"the value of meals * * * furnished by or on behalf of the employer," and to cross-reference the entirety of Section 119, 26 U.S.C. 3231(e)(9), if it intended only to provide an exclusion for employees required to pay fees for their meals as provided in Section 119(b)(3)(A). And even if this were a plausible reading of the portion of the RRTA exclusion that governs *meals*, it would deprive the RRTA exclusion for employer-furnished *lodging* of any practical significance.

The exclusion for employer-provided health and disability insurance, 26 U.S.C. 3231(e)(1)(i), would likewise be partially superfluous under petitioners' reading of "money remuneration." Petitioners observe (Br. 38) that *parts* of Section 3231(e)(1)(i) would have meaning on their view because the exclusion encompasses circumstances in which the employer reimburses the employee for obtaining insurance. See *ibid.* (explaining that the exclusion covers some "cash payments made to an employee"). Under petitioners' approach, however, other language in that provision would be devoid of any practical effect, since Section 3231(e)(1)(i) expressly encompasses circumstances in which the employer simply pays for the employee's health insurance. See 26 U.S.C. 3231(e)(1)(i) (exclusion for "the amount of any payment * * * made to, *or on behalf of*, an employee * * * under a plan or system established by an employer * * * on account of sickness or accident disability") (emphasis added).

B. Historical Practice Supports The Court Of Appeals' Conclusion That An Employer's Provision Of Stock To Its Employees Falls Within The RRTA's Definition Of Taxable "Compensation"

Before it enacted the RRTA, Congress used the term "money remuneration" in ways that reached well beyond currency. The responsible federal agencies' contemporaneous interpretations of that term also extended beyond currency to stock and other in-kind benefits. And by repeatedly amending the RRTA's definition of "compensation" to exclude particular in-kind benefits, while leaving the general definition unchanged, Congress acquiesced in the construction of "money remuneration" that the agencies have applied for more than half a century.

1. Congress's use of the term "money remuneration" before the enactment of the RRTA demonstrates an understanding that the term reaches non-cash benefits

Congress first defined "compensation" as "any form of money remuneration" in 1935 railroad-retirement legislation that was ultimately struck down as exceeding Congress's powers under the Commerce Clause and other constitutional provisions. Carriers and Employees Tax Act (CETA), ch. 813, § 1(d), 49 Stat. 974; see *Railroad Ret. Bd.* v. *Alton R.R.*, 295 U.S. 330 (1935). That legislation consisted of taxation and benefits statutes paralleling the RRTA and RRA.

Early versions of the 1935 railroad-benefits statute reflected an understanding that the term "any form of money remuneration" could encompass non-cash compensation. Those bills defined "compensation" as "any form of money remuneration for active service received by an employee from a carrier, *including salaries, commissions, and the reasonable value of board, rents,*

lodging, and other similar advantages furnished for subsistence to an employee while in service," while excluding "the value of such boards, rents, housing, lodging, and other similar advantages combined which is less than $10 for any calendar month," and further excluding "free transportation." S. 2862, 74th Cong., 1st Sess., § 1(e), at 3 (1935) (defining "compensation") (emphasis added); see H.R. 8121, 74th Cong., 1st Sess. § 1(e), at 3 (1935) (identical definition used to define "pay"). While the railroad-benefits statute that Congress ultimately enacted in 1935 contained a simpler definition of "compensation," which omitted illustrative examples of money remuneration and the carve-out for certain smaller-value benefits, the proposed bills demonstrate an understanding that "any form of money remuneration" naturally includes readily-valued in-kind compensation.[7]

The express exclusion of free-transportation benefits in the enacted 1935 railroad benefits and taxation statutes reinforces the breadth of "any form of money remuneration." At the time of the RRTA's enactment, railroad workers typically received "free transportation during all of their lives." *H.R. 8652 Hearings* 6. The RRTA and RRA predecessors that Congress enacted in 1935 expressly exempted those benefits from taxation by providing that "compensation" "shall not include free transportation." CETA § 1(d), 49 Stat. 974; see Railroad Retirement Act of 1935, ch. 812, § 1(g), 49 Stat. 968.

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[7] These 1935 proposals appear to have been abandoned because of their reliance on the Commerce Clause, in the wake of this Court's decision invalidating an early version of the RRTA on the ground that it exceeded Congress's Commerce Clause authority. See *Douglas Report* 64 (describing withdrawal of these draft bills).

Those exclusions reflect, at minimum, the understanding that "any form of money remuneration" could reasonably be read to reach those benefits, absent an exclusion.[8]

2. ***Agency interpretations that have been ratified by Congress reflect the understanding that RRTA "compensation" includes stock***

a. i. In 1937, the Department of Treasury issued a regulation that defined the RRTA term "compensation" to reach both "all remuneration in money" and remuneration in "something which may be used in lieu of money (scrip and merchandise orders, for example)." 26 C.F.R. 410.5 (1938); Treas. Reg. 100, Art. 5 (1937) (same). That regulation remained in effect, essentially unchanged, for more than 50 years. See 59 Fed. Reg. at 66,188 (first major revision to the regulation). The primary definition of "scrip" at the time of the RRTA's enactment referred to "[c]ertificates of ownership, either absolute or conditional, of shares in a public company, corporate profits, etc." *Black's Law Dictionary* 1588 (3d ed. 1933); see C. Martin Alsager, *Dictionary of Business Terms* 321 (1932) ("A certificate which represents fractions of shares of stock.") (primary definition);

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[8] One report suggests that the drafters of the 1937 RRA concluded that an express exclusion was not needed to place railroad workers' transportation benefits outside the RRA. See S. Rep. No. 697, 75th Cong., 1st Sess. 8 (1937) (describing the 1937 RRA as "omitt[ing] part of the [1935 RRA's] definition of 'compensation' as superfluous"). That view is consistent with the understanding that "money remuneration" encompasses many in-kind benefits—as reflected in agency interpretations and subsequent congressional enactments—because the lifetime, non-transferrable travel privileges that railroad workers received did not have a readily ascertainable cash value. See 20 C.F.R. 222.2 (1938); see also pp. 38-40, *infra*.

3 F. Stroud, *The Judicial Dictionary* 1802 (2d ed. 1903) ("a [c]ertificate, transferable by delivery, entitling its holder to become a Shareholder or Bondholder in respect of the shares or bonds therein mentioned") (emphasis omitted) (primary definition); see, *e.g.*, *Eisner* v. *Macomber*, 252 U.S. 189, 227 (1920) (Brandeis, J., dissenting) (referring to "scrip" as company stock).

Petitioners assert that the term "scrip" in that regulation is best understood as a reference to "'private currency issued by corporations . . . to meet payrolls and which was redeemable in the company store.'" Pets. Br. 27 n.4 (citation omitted). But the definition petitioners propose did not appear at all in the 1933 edition of *Black's Law Dictionary*, which defined "scrip" as a certificate for stock in its primary definition, not in a "subordinate" one, *ibid.* Petitioners' definition also does not appear in the other RRTA-era dictionaries cited above. And even if the term "scrip" in the 1937 regulation encompassed the type of "private currency" to which petitioners refer, there is no reason to construe it as *excluding* publicly traded stocks that can be readily converted to cash.

ii. The year after the RRTA and RRA were enacted, the Board issued regulations that construed the definition of "compensation" in the RRA. Because the RRA's definition of "compensation," 45 U.S.C. 231(h)(1), is identical to the RRTA's in pertinent part, see 26 U.S.C. 3231(e)(1), and because RRTA taxes are used to fund RRA benefits, courts have long held that the statutes' definitions "should be identically construed and applied," *Universal Carloading & Distrib. Co.* v. *Pedrick*, 184 F.2d 64, 66 (2d Cir.), cert. denied, 340 U.S. 905 (1950); see, *e.g.*, *Atlantic Land & Improvement Co.* v. *United States*, 790 F.2d 853, 855 (11th Cir. 1986).

The Board's 1938 regulations treated the term "any form of money remuneration" as reaching in-kind compensation that could be assigned a definite cash value. In particular, those regulations, which remain in effect today, provided that "amounts to be paid in the form of a commodity, service, or privilege" qualified as "compensation" so long as the employer and employee had agreed in advance that part of the employee's compensation would be paid "in the form of such commodity, service, or privilege," and had also agreed "upon the value of such commodity, service, or privilege." 20 C.F.R. 222.2 (1938); see 20 C.F.R. 211.2(a) (current).

The Board's informal guidance confirmed that the agency understood "money remuneration" to include non-cash compensation with a determinate value. That guidance explained that "compensation" includes "any money equivalent" that was part of an employee's agreed wages and had "an agreed definite value." Staff of the R.R. Ret. Bd., *Selected Questions & Answers on Railroad Retirement Act* 20, 22 (R.R. Ret. Bd. 1937). Among the items that could constitute "compensation," the guidance identified "[r]ent of section houses, or of depot living rooms, or fuel, electric current, water, or food," so long as those benefits were "received as part of [an] agreed wage at an agreed definite value." *Id.* at 22. An instruction manual for employers similarly explained that "compensation" includes those items "which may be used in lieu of money," which could include "[s]crip, merchandise orders, the use of a house or any other valuable equivalent" whose value was agreed

upon. Railroad Retirement Board, *Instructions to Employers and Manual of Operations for Collection of Prior Service Records*, App. to Art. 2, at I (1940).[9]

Consistent with the relatively broad understanding of "money remuneration" reflected in its regulations, the Board has determined in legal opinions that stock can qualify as "money remuneration." The year after the RRTA and RRA were enacted, the Board issued an opinion stating that "stock [that] was received by * * * employees as a part of their agreed compensation," as distinct from payments to induce an employee's initial entry into an employment agreement, constituted

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[9] Early Board and IRS opinions predating the enactment of specific Internal Revenue Code provisions governing employer-provided fringe benefits (see 26 U.S.C 3231(e)(5); 26 U.S.C 3231(e)(9)) accordingly determined that particular in-kind benefits were "money remuneration" when they were conferred pursuant to an employment agreement and the employer and employee had agreed as to the benefit's value. For example, a 1944 opinion determined that employer-sponsored life insurance was "money remuneration." Board G.C.M. L-44-272 (May 4, 1944). And numerous opinions classified lodging as "compensation" when it was furnished pursuant to an employment agreement. Board G.C.M. L-45-174 (Mar. 27, 1945) (housing benefit for rail foreman); Board G.C.M. L-43-891 (Dec. 31, 1943) (same); Board G.C.M. L-41-576 (Nov. 10, 1941) (same); compare Board G.C.M. L-39-69, at 3 (Feb. 9, 1939) (housing for certain employees was not "money remuneration" because the parties had not agreed on a "definite value in terms of dollars and cents" for the benefit and the Board would not "undertake to assign any value thereto"); Board G.C.M. L-39-727, at 1 (Nov. 13, 1939) (room and board were not "compensation" when they were provided "as a matter of company convenience, not as partial compensation"); see Rev. Rul. 391, 1969-2 C.B. 191 (housing accommodations furnished to employee are compensation "[i]f an employer and employee have agreed that housing accommodations of an appropriate fixed value are a part of the employee's total remuneration").

"money remuneration" for services rendered under the RRTA. Board G.C.M. L-38-440, at 2. A more recent opinion likewise concluded that NQSOs provide "money remuneration." Board G.C.M. L-2005-25, at 5-7.[10]

b. These contemporaneous interpretations of the relevant statutory definition deserve significant weight. The manner in which the responsible federal agencies construed and applied the RRTA and RRA immediately after enactment are evidence of the original public meaning of the statutory language. See, *e.g.*, *Edwards' Lessee* v. *Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827) ("In the construction of a doubtful and ambiguous law, the cotemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."); see also *Norwegian Nitrogen Prods. Co.* v. *United States*, 288 U.S. 294, 315 (1933).

In the ensuing years, moreover, Congress has enacted numerous amendments to the statutes without altering or calling into question the agencies' determination that non-cash benefits like stock can constitute a "form of money remuneration." "[W]hen Congress revisits a statute giving rise to a longstanding administra-

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[10] A 1997 Board opinion concluded that a stock award for "perfect attendance and superior performance" that was solely in the employer's discretion and not part of the employment agreement was not "money remuneration" under the RRA while distinguishing cases in which "it [was] agreed upon in advance that the performance of certain services, *e.g.*, perfect attendance, would result in an award" of stock. Board G.C.M. L-97-16, at 1-2 & n.1 (Apr. 16, 1997). That opinion's special treatment for awards outside the terms of the employment agreement is not consistent with the Board's 2005 legal opinion regarding NQSOs. See Board G.C.M. L-2005-25, at 5-7.

tive interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986) (citation and internal quotation marks omitted); see *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 159 (2013) (same point); *Cottage Sav. Ass'n* v. *Commissioner*, 499 U.S. 554, 561 (1991) ("Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law.") (citations omitted). The inference that Congress has approved the agencies' interpretation of the term "money remuneration" is particularly strong because Congress has added numerous exclusions to the definition of "compensation" that would make little sense under petitioners' contrary reading of that term. See *Texas Dep't of Hous. & Community Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) (finding inference of congressional ratification to be particularly strong when statutory amendments "presupposed" a point embodied in the earlier interpretations).

C. Treating An Employer's Provision Of Publicly Traded Stock As Taxable "Compensation" Furthers The RRTA's Objectives

1. The RRTA and RRA were enacted to replace inadequately funded private pension plans with a financially stable and self-sustaining system of pension benefits for railroad workers. Whitman 41; Joint Committee Print 15-17. As this Court has explained in the context of social security, the interest in providing a financially stable, self-sustaining pension system counsels against "constricted interpretation of the phrasing" of

the taxing statute. *United States* v. *Silk*, 331 U.S. 704, 712 (1947). An unduly narrow interpretation "would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation." *Ibid.*

Construing "any form of money remuneration" to exclude highly liquid cash substitutes would enable employers to "avoid the immediate burdens" of RRTA taxation, at the expense of adequately funding the benefits that the RRA guarantees. *Silk*, 331 U.S. at 712; see *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 575 (1979) (noting that Tier 1 of RRA "benefits corresponds exactly to those an employee would expect to receive were he covered by the Social Security Act."). Publicly traded stock, like a savings bond or a Bitcoin, is a highly liquid asset that functions as a near-cash-equivalent and could easily be substituted for cash compensation without significantly inconveniencing employees. The recipient can simply direct his broker to exercise the option and sell the stock, depositing the proceeds in his bank account—as more than 90% of employees exercising options at several railroads do. See *BNSF*, 775 F.3d at 747; *CSX Corp.*, 2017 WL 2800181, at *2.

Petitioners' approach would create a particularly serious threat to the design of the RRTA system because stock-based compensation is a rapidly increasing share of employee compensation for high-level employees. See pp. 6-7, *supra*. Exempting from RRTA taxation a growing share of employee compensation, and providing a roadmap for exempting a still greater share of employee compensation in the future, would undermine

the RRTA's core objective of providing a stable and well-funded pension system.

2. Petitioners suggest (Br. 3-4, 41, 46-47) that their interpretation is consistent with a purported congressional goal of "[m]odeling the new railroad retirement system on the existing pension structure" that was used in pre-RRTA private railroad pension plans. Pets. Br. 41. But Congress established the RRTA in response to the "myriad problems facing the railroad industry's private pension plans," which were "generally inadequate, liable to capricious termination, and of little assistance to disabled employees." Whitman 41. In suggesting that Congress sought to replicate the design of the preexisting private pension system, petitioners appear to rely on the fact that Congress estimated RRTA tax revenues using a percentage of the railroad employers' "'pay roll,' as memorialized in the railroads' annual reports to the Interstate Commerce Commission." Pets. Br. 26. It is unsurprising, however, that Congress made estimates using the pay statistic that had already been published in government reports. Congress's use of that statistic as a starting point does not suggest an intent to replicate, in the new federal program, the substance of pre-RRTA private railroad pension schemes. And petitioners themselves concede (Br. 24) that the RRTA by its terms reaches beyond the regular salaries that constituted employers' payrolls, and also includes "commissions, bonuses" and any other remuneration in currency.

Petitioners' related suggestion that "[a] narrower tax base makes perfect sense because the RRTA imposes higher tax *rates* than does FICA," Br. 45, reflects a misunderstanding of the RRTA's design. The RRTA's Tier 1 tax rates are identical to the FICA's, and they

fund benefits identical to those paid under social security. See 26 U.S.C. 3201(a); *Hisquierdo*, 439 U.S. at 575. Congress could not have expected to fund the same benefit levels as social security by applying the identical tax rate to a materially smaller category of compensation. The RRTA also imposes an additional Tier 2 tax which funds different, pension-style benefits. See *Hisquierdo*, 439 U.S. at 575. But the existence of a Tier 2 tax that has no social security analogue should not obscure the fundamental correspondence between the Tier 1 and FICA taxes.

D. Deference Principles Support Treating Stock As Taxable "Compensation" Under The RRTA

As the court below correctly held, the RRTA's definition of taxable "compensation," read in light of the statute's history and design, is most naturally understood to encompass shares of publicly traded stock. Regulations promulgated by the agency that administers the statute reinforce that conclusion.

1. Current Department of Treasury regulations state that "[t]he term compensation" under the RRTA "has the same meaning as the term wages" in the FICA, "except as specifically limited by the [RRTA]" or by regulation. 26 C.F.R. 31.3231(e)-(1)(a) (emphasis omitted). In adopting that regulation in 1994, the agency emphasized that decades of amendments to the FICA and the RRTA had brought the statutes closer together, including by "conforming the structure of the RRTA to parallel that of the FICA." 59 Fed. Reg. at 66,188. The Department of Treasury observed that Congress had also enacted parallel exemptions covering common "nonmonetary benefits such as fringe benefits, meals and lodging," and life-insurance premiums, so that "the exclusions from the definition of compensation under the

RRTA, with few exceptions, mirror the exclusions from the definition of wages under the FICA." *Ibid.* The agency also noted that, in making other changes to the RRTA, "Congress often indicated the purpose was to provide conformity to FICA." *Ibid.* Taking account of that history and the statutes' now-parallel structures, the Department of Treasury determined that the statutes' categories of taxable income should be construed as parallel except when the RRTA's definition is "specifically limited." 26 C.F.R. 31.3231(e)-(1)(a). That regulation supports the conclusion that NQSOs are taxable under the RRTA because such options are taxable under the FICA and the RRTA contains no specific limitation governing NQSOs.

In addition, the Board's regulation defining "compensation" under the RRA reinforces the conclusion that publicly traded stock is taxable "compensation" under the RRTA. The RRA and the RRTA contain identical definitions of "compensation." See 26 U.S.C. 3231(e); 45 U.S.C. 231(h)(1). And since 1938, the Board has interpreted the RRA term "any form of money remuneration" in a manner that is flatly inconsistent with petitioners' view that "compensation" reaches only those mediums of exchange that can be used to buy groceries or pay rent. Instead, the Board has concluded that "money remuneration" can include payments in the form of a "commodity, a service or a privilege." 20 C.F.R. 211.2; see pp. 38-41, *supra*.

2. Petitioners' contrary arguments lack merit.

a. Petitioners contend (Br. 47-48) that the Department of Treasury regulation by its own terms does not treat stock acquired through the exercise of NQSOs as taxable "compensation" under the RRTA. The regulation states that the RRTA term "compensation" and the

FICA term "wages" should be treated as congruent "except as specifically limited by the [RRTA]" or by regulation. 26 C.F.R. 31.3231(e)-(1)(a) (emphasis omitted). Petitioners argue (Br. 47) that, through its inclusion of the word "money" in its basic definition of "compensation," "the RRTA *does* 'specifically limit' what would otherwise be taxable under FICA." Petitioners contend on that basis (Br. 47-48) that, if publicly traded stock would otherwise fall outside the RRTA term "money remuneration," it is not encompassed by the regulatory definition either.

That is not a plausible reading of the regulation. The basic purpose of the Department of Treasury rule was to align the general RRTA and FICA definitions. See 59 Fed. Reg. at 66,188 (stating that, because "Tier 1 of the RRTA mirrors the Federal Insurance Contributions Act (FICA), these regulations generally cross-reference the definition of compensation under the RRTA to the definition of wages under the FICA"). Under petitioners' theory, however, the RRTA term "compensation" and the FICA term "wages" would differ substantially in their coverage because one definition contains the word "money" and the other does not. The Department of Treasury's regulation cannot plausibly be thought to incorporate that approach. *BNSF*, 775 F.3d at 757. Rather, the reference to instances in which the definition of "compensation" is "specifically limited by the [RRTA]," 26 C.F.R. 31.3231(e)-1(a), is best understood as a reference to the specific RRTA exclusions that differ from those under the FICA.

b. Petitioners argue (Br. 48) that the Department of Treasury could not lawfully classify the provision of stock through NQSOs as taxable "compensation" under

the RRTA because the statutory definition is "unambiguous" in excluding non-currency compensation. As explained above, however, the RRTA's basic definition of "compensation," read in light of the accompanying exclusions for particular types of stock options and various in-kind benefits, is most naturally understood to encompass stock. At the very least, the statutory definition does not foreclose the Department of Treasury's approach.

Petitioners also suggest that a regulation aligning the basic definitions of RRTA "compensation" and FICA "wages"—subject to the distinct (though overlapping) express exclusions in the two statutes—would be unreasonable under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because it effectively "excise[s]" "the word 'money' * * * from the statute." Pets. Br. 48. That is incorrect. Now, as when the RRTA was enacted, the word "money" in the RRTA definition limits taxable "compensation" to payments that can be readily valued in or converted to cash. But Congress subsequently amended both the FICA and the RRTA to address hard-to-value fringe benefits and generally exclude them from taxation. See 26 U.S.C. 3121(a)(20), 3231(e)(5). Along with other parallel exclusions, Congress has also enacted parallel subsections that address in detail employer-provided meals and lodging under the FICA, see 26 U.S.C. 3121(a)(19), and under the RRTA, see 26 U.S.C. 3231(e)(9). It was not unreasonable for the Department of Treasury to conclude, after Congress had added these specific provisions to both the RRTA and the FICA, that the respective definitions of taxable "compensation" and "wages" do not now have materially different meanings, except where the statutes' enumerated exceptions differ. See 26 C.F.R. 31.3231(e)-1(a).

Petitioners also argue (Br. 42-45) that provisions that use distinct language—as the definitional provisions in the RRTA and the FICA do—cannot reasonably be treated as largely parallel. But while this Court has reasoned that Congress's decision to "include[] particular language in one section of a statute but omit[] it in another" triggers a "presum[ption] that Congress intended a difference in meaning," *Digital Realty Trust, Inc.* v. *Somers*, No. 16-1276 (Feb. 21, 2018), slip op. 10 (quoting *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014)), this Court has consistently treated that principle as one limited to different words in provisions of the same statute or statutes that were derived from one another. See, *e.g.*, *Department of Homeland Sec.* v. *MacLean*, 135 S. Ct. 913, 919 (2015) (citing *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). The decisions of this Court on which petitioners rely (Br. 42-45) accordingly involve provisions of the same statute, see *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 62-63 (2006) (substantive and anti-retaliation provisions of Title VII of the Civil Rights Act of 1964); *Russello*, 464 U.S. at 23 (language in different subsections of the Racketeer Influenced and Corrupt Organizations Act), or "cognate[s]" derived from the same statutory provision, see Antonin Scalia & Bryan A. Garner, *Reading the Law: The Interpretation of Legal Texts* 254 (2012) (discussing *United States* v. *Ressam*, 553 U.S. 272, 276-277 (2008)).

Moreover, even in the context of a single statute, this Court has never treated the principle that the different words should be assigned different meaning as one that can displace the best interpretation of statutory language derived from the text itself, or from history or context. On the contrary, this Court has cautioned that

"there is no 'canon of interpretation that forbids interpreting different words used in different parts of the same statute to mean roughly the same thing.'" *Jennings* v. *Rodriguez*, No. 15-1204 (Feb. 27, 2018), slip op. 19 (quoting *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519, 540 (2013)); see *Tyler* v. *Cain*, 533 U.S. 656, 664 (2001) (explaining that "Congress * * * is permitted to use synonyms in a statute" and that "determined" and "held" were synonyms). And it has described the principle that "use of 'certain language in one part of the statute and different language in another' can indicate that 'different meanings were intended'" as "no more than a rule of thumb." *Auburn Reg'l Med. Ctr.*, 568 U.S. at 156 (brackets and citations omitted).[11]

Finally, petitioners are wrong in suggesting that the Department of Treasury's regulation would "nullify 26 U.S.C. § 3121(b)(9), which provides that FICA is inapplicable to railroads." Pets. Br. 49 (emphasis omit-

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[11] Petitioners also suggest (Pets. Br. 10-11) that Congress must have intended the RRTA's basic definition of taxable "compensation" to differ from FICA "wages" because in 1992, Congress did not enact a piece of major economic legislation, one provision of which would have directly adopted FICA's definition of "wages" in the RRTA context. See S. 2216, 102d Cong., 2d Sess. (1992); H.R. 4150, 102d Cong., 2d Sess. (1992). But reasoning from failed legislation is generally inappropriate, because many explanations can explain Congress's failure to enact a particular measure, including the possibility that Congress thought existing law already embodied the principle in the proposed new law. See, *e.g.*, *Star Athletica, LLC* v. *Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017) (finding unilluminating the "history of failed legislation" on which a litigant had relied, in reliance on the principle that "'[c]ongressional inaction lacks persuasive significance' in most circumstances") (quoting *Pension Benefit Guar. Corp.* v. *The LTV Corp.*, 496 U.S. 633, 650 (1990)) (brackets in original).

ted). By exempting railroad workers from FICA taxation, Section 3121(b)(9) ensures that compensation of railroad employees is not taxed under both the RRTA and the FICA. The regulatory definition of RRTA "compensation" does not create any risk of the double taxation that Section 3121(b)(9) is intended to prevent.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 26 U.S.C. 3231(e) provides:

Subchapter D—General Provisions [RRTA]

Definitions

(e) Compensation

For purposes of this chapter—

(1) The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers. Such term does not include (i) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of sickness or accident disability or medical or hospitalization expenses in connection with sickness or accident disability or death, except that this clause does not apply to a payment for group-term life insurance to the extent that such payment is includible in the gross income of the employee, (ii) tips (except as is provided under paragraph (3)), (iii) an amount paid specifically—either as an advance, as reimbursement or allowance—for traveling or other bona fide and necessary expenses incurred or reasonably expected to be incurred in the business of the employer provided any such payment is iden-

tified by the employer either by a separate payment or by specifically indicating the separate amounts where both wages and expense reimbursement or allowance are combined in a single payment, or (iv) any remuneration which would not (if chapter 21 applied to such remuneration) be treated as wages (as defined in section 3121(a)) by reason of section 3121(a)(5). Such term does not include remuneration for service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act, as amended, and which is performed to carry out the purpose specified in subparagraph (F), (J), (M), or (Q), as the case may be. For the purpose of determining the amount of taxes under sections 3201 and 3221, compensation earned in the service of a local lodge or division of a railway-labor-organization employer shall be disregarded with respect to any calendar month if the amount thereof is less than $25. Compensation for service as a delegate to a national or international convention of a railway labor organization defined as an "employer" in subsection (a) of this section shall be disregarded for purposes of determining the amount of taxes due pursuant to this chapter if the individual rendering such service has not previously rendered service, other than as such a delegate, which may be included in his "years of service" for purposes of the Railroad Retirement Act. Nothing in the regulations prescribed for purposes of chapter 24 (relating to wage withholding) which provides an exclusion from

"wages" as used in such chapter shall be construed to require a similar exclusion from "compensation" in regulations prescribed for purposes of this chapter.

(2) Application of contribution bases

(A) Compensation in excess of applicable base excluded

(i) In general

The term "compensation" does not include that part of remuneration paid during any calendar year to an individual by an employer after remuneration equal to the applicable base has been paid during such calendar year to such individual by such employer for services rendered as an employee to such employer.

(ii) Remuneration not treated as compensation excluded

There shall not be taken into account under clause (i) remuneration which (without regard to clause (i)) is not treated as compensation under this subsection.

(iii) Hospital insurance taxes

Clause (i) shall not apply to—

(I) so much of the rate applicable under section 3201(a) or 3221(a) as does not exceed the rate of tax in effect under section 3101(b), and

(II) so much of the rate applicable under section 3211(a) as does not exceed the rate of tax in effect under section 1401(b).

(B) Applicable base

(i) Tier 1 taxes

Except as provided in clause (ii), the term "applicable base" means for any calendar year the contribution and benefit base determined under section 230 of the Social Security Act for such calendar year.

(ii) Tier 2 taxes, etc.

For purposes of—

(I) the taxes imposed by sections 3201(b), 3211(b), and 3221(b), and

(II) computing average monthly compensation under section 3(j) of the Railroad Retirement Act of 1974 (except with respect to annuity amounts determined under subsection (a) or (f)(3) of section 3 of such Act),

clause (2) of the first sentence, and the second sentence, of subsection (c) of section 230 of the Social Security Act shall be disregarded.

(C) Successor employers

For purposes of this paragraph, the second sentence of section 3121(a)(1) (relating to successor employers) shall apply, except that—

(i) the term "services" shall be substituted for "employment" each place it appears,

(ii) the term "compensation" shall be substituted for "remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection)" each place it appears, and

(iii) the terms "employer", "services", and "compensation" shall have the meanings given such terms by this section.

(3) Solely for purposes of the taxes imposed by section 3201 and other provisions of this chapter insofar as they relate to such taxes, the term "compensation" also includes cash tips received by an employee in any calendar month in the course of his employment by an employer unless the amount of such cash tips is less than $20.

(4)(A) For purposes of applying sections 3201(a), 3211(a), and 3221(a), in the case of payments made to an employee or any of his dependents on account of sickness or accident disability, clause (i) of the second sentence of paragraph (1) shall exclude from the term "compensation" only—

(i) payments which are received under a workmen's compensation law, and

(ii) benefits received under the Railroad Retirement Act of 1974.

(B) Notwithstanding any other provision of law, for purposes of the sections specified in subparagraph (A), the term "compensation" shall include benefits

paid under section 2(a) of the Railroad Unemployment Insurance Act for days of sickness, except to the extent that such sickness (as determined in accordance with standards prescribed by the Railroad Retirement Board) is the result of on-the-job injury.

(C) Under regulations prescribed by the Secretary, subparagraphs (A) and (B) shall not apply to payments made after the expiration of a 6-month period comparable to the 6-month period described in section 3121(a)(4).

(D) Except as otherwise provided in regulations prescribed by the Secretary, any third party which makes a payment included in compensation solely by reason of subparagraph (A) or (B) shall be treated for purposes of this chapter as the employer with respect to such compensation.

(5) The term "compensation" shall not include any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 108(f)(4), 117, or 132.

(6) The term "compensation" shall not include any payment made, or benefit furnished, to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127.

[(7) Repealed. Pub. L. 113–295, div. A, title II, § 221(a)(19)(B)(v), Dec. 19, 2014, 128 Stat. 4040.]

(8) Treatment of certain deferred compensation and salary reduction arrangements

(A) Certain employer contributions treated as compensation

Nothing in any paragraph of this subsection (other than paragraph (2)) shall exclude from the term "compensation" any amount described in subparagraph (A) or (B) of section 3121(v)(1).

(B) Treatment of certain nonqualified deferred compensation

The rules of section 3121(v)(2) which apply for purposes of chapter 21 shall also apply for purposes of this chapter.

(9) Meals and lodging

The term "compensation" shall not include the value of meals or lodging furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119.

(10) Archer MSA contributions

The term "compensation" shall not include any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(b).

(11) Health savings account contributions

The term "compensation" shall not include any payment made to or for the benefit of an employee if

at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(d).

(12) Qualified stock options

The term "compensation" shall not include any remuneration on account of—

(A) a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b)), or

(B) any disposition by the individual of such stock.

2. 26 U.S.C. 74(c) provides:

PART II—ITEMS SPECIFICALLY INCLUDED IN GROSS INCOME [INTERNAL REVENUE CODE]

Prizes and awards

(c) Exception for certain employee achievement awards

(1) In general

Gross income shall not include the value of an employee achievement award (as defined in section 274(j)) received by the taxpayer if the cost to the employer of the employee achievement award does not exceed the amount allowable as a deduction to the employer for the cost of the employee achievement award.

(2) Excess deduction award

If the cost to the employer of the employee achievement award received by the taxpayer exceeds the amount allowable as a deduction to the employer, then gross income includes the greater of—

(A) an amount equal to the portion of the cost to the employer of the award that is not allowable as a deduction to the employer (but not in excess of the value of the award), or

(B) the amount by which the value of the award exceeds the amount allowable as a deduction to the employer.

The remaining portion of the value of such award shall not be included in the gross income of the recipient.

(3) Treatment of tax-exempt employers

In the case of an employer exempt from taxation under this subtitle, any reference in this subsection to the amount allowable as a deduction to the employer shall be treated as a reference to the amount which would be allowable as a deduction to the employer if the employer were not exempt from taxation under this subtitle.

(4) Cross reference

For provisions excluding certain de minimis fringes from gross income, see section 132(e).

3. 26 U.S.C. 119 provides:

PART III—ITEMS SPECIFICALLY EXCLUDED FROM GROSS INCOME [INTERNAL REVENUE CODE]

Meals or lodging furnished for the convenience of the employer

(a) Meals and lodging furnished to employee, his spouse, and his dependents, pursuant to employment

There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him, his spouse, or any of his dependents by or on behalf of his employer for the convenience of the employer, but only if—

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

(b) Special rules

For purposes of subsection (a)—

(1) Provisions of employment contract or State statute not to be determinative

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.

(2) Certain factors not taken into account with respect to meals

In determining whether meals are furnished for the convenience of the employer, the fact that a charge is made for such meals, and the fact that the employee may accept or decline such meals, shall not be taken into account.

(3) Certain fixed charges for meals

(A) In general

If—

(i) an employee is required to pay on a periodic basis a fixed charge for his meals, and

(ii) such meals are furnished by the employer for the convenience of the employer,

there shall be excluded from the employee's gross income an amount equal to such fixed charge.

(B) Application of subparagraph (A)

Subparagraph (A) shall apply—

(i) whether the employee pays the fixed charge out of his stated compensation or out of his own funds, and

(ii) only if the employee is required to make the payment whether he accepts or declines the meals.

(4) Meals furnished to employees on business premises where meals of most employees are otherwise excludable

All meals furnished on the business premises of an employer to such employer's employees shall be treated as furnished for the convenience of the employer if, without regard to this paragraph, more than half of the employees to whom such meals are furnished on such premises are furnished such meals for the convenience of the employer.

(c) Employees living in certain camps

(1) In general

In the case of an individual who is furnished lodging in a camp located in a foreign country by or on behalf of his employer, such camp shall be considered to be part of the business premises of the employer.

(2) Camp

For purposes of this section, a camp constitutes lodging which is—

(A) provided by or on behalf of the employer for the convenience of the employer because the place at which such individual renders services is in a remote area where satisfactory housing is not available on the open market,

(B) located, as near as practicable, in the vicinity of the place at which such individual renders services, and

(C) furnished in a common area (or enclave) which is not available to the public and which normally accommodates 10 or more employees.

(d) Lodging furnished by certain educational institutions to employees

(1) In general

In the case of an employee of an educational institution, gross income shall not include the value of qualified campus lodging furnished to such employee during the taxable year.

(2) Exception in cases of inadequate rent

Paragraph (1) shall not apply to the extent of the excess of—

(A) the lesser of—

(i) 5 percent of the appraised value of the qualified campus lodging, or

(ii) the average of the rentals paid by individuals (other than employees or students of the educational institution) during such calendar year for lodging provided by the educational institution which is comparable to the qualified campus lodging provided to the employee, over

(B) the rent paid by the employee for the qualified campus lodging during such calendar year.

The appraised value under subparagraph (A)(i) shall be determined as of the close of the calendar year in which the taxable year begins, or, in the case of a

rental period not greater than 1 year, at any time during the calendar year in which such period begins.

(3) Qualified campus lodging

For purposes of this subsection, the term "qualified campus lodging" means lodging to which subsection (a) does not apply and which is—

(A) located on, or in the proximity of, a campus of the educational institution, and

(B) furnished to the employee, his spouse, and any of his dependents by or on behalf of such institution for use as a residence.

(4) Educational institution, etc.

For purposes of this subsection—

(A) In general

The term "educational institution" means—

(i) an institution described in section 170(b)(1)(A)(ii) (or an entity organized under State law and composed of public institutions so described), or

(ii) an academic health center.

(B) Academic health center

For purposes of subparagraph (A), the term "academic health center" means an entity—

(i) which is described in section 170(b)(1)(A)(iii),

(ii) which receives (during the calendar year in which the taxable year of the taxpayer begins) payments under subsection (d)(5)(B) or (h) of section 1886 of the Social Security Act (relating to graduate medical education), and

(iii) which has as one of its principal purposes or functions the providing and teaching of basic and clinical medical science and research with the entity's own faculty.

4. 26 U.S.C. 132 provides in pertinent part:

PART III—ITEMS SPECIFICALLY EXCLUDED FROM GROSS INCOME [INTERNAL REVENUE CODE]

(a) Exclusion from gross income

Gross income shall not include any fringe benefit which qualifies as a—

(1) no-additional-cost service,

(2) qualified employee discount,

(3) working condition fringe,

(4) de minimis fringe,

(5) qualified transportation fringe,

(6) qualified moving expense reimbursement,

(7) qualified retirement planning services, or

(8) qualified military base realignment and closure fringe.

(b) No-additional-cost service defined

For purposes of this section, the term "no-additional-cost service" means any service provided by an employer to an employee for use by such employee if—

(1) such service is offered for sale to customers in the ordinary course of the line of business of the employer in which the employee is performing services, and

(2) the employer incurs no substantial additional cost (including forgone revenue) in providing such service to the employee (determined without regard to any amount paid by the employee for such service).

* * * * *

(d) Working condition fringe defined

For purposes of this section, the term "working condition fringe" means any property or services provided to an employee of the employer to the extent that, if the employee paid for such property or services, such payment would be allowable as a deduction under section 162 or 167.

(e) De minimis fringe defined

For purposes of this section—

(1) In general

The term "de minimis fringe" means any property or service the value of which is (after taking into account the frequency with which similar fring-

es are provided by the employer to the employer's employees) so small as to make accounting for it unreasonable or administratively impracticable.

(2) Treatment of certain eating facilities

The operation by an employer of any eating facility for employees shall be treated as a de minimis fringe if—

(A) such facility is located on or near the business premises of the employer, and

(B) revenue derived from such facility normally equals or exceeds the direct operating costs of such facility.

The preceding sentence shall apply with respect to any highly compensated employee only if access to the facility is available on substantially the same terms to each member of a group of employees which is defined under a reasonable classification set up by the employer which does not discriminate in favor of highly compensated employees. For purposes of subparagraph (B), an employee entitled under section 119 to exclude the value of a meal provided at such facility shall be treated as having paid an amount for such meal equal to the direct operating costs of the facility attributable to such meal.

(f) Qualified transportation fringe

(1) In general

For purposes of this section, the term "qualified transportation fringe" means any of the following provided by an employer to an employee:

(A) Transportation in a commuter highway vehicle if such transportation is in connection with travel between the employee's residence and place of employment.

(B) Any transit pass.

(C) Qualified parking.

(D) Any qualified bicycle commuting reimbursement.

(2) Limitation on exclusion

The amount of the fringe benefits which are provided by an employer to any employee and which may be excluded from gross income under subsection (a)(5) shall not exceed—

(A) $175 per month in the case of the aggregate of the benefits described in subparagraphs (A) and (B) of paragraph (1),

(B) $175 per month in the case of qualified parking, and

(C) the applicable annual limitation in the case of any qualified bicycle commuting reimbursement.

(3) Cash reimbursements

For purposes of this subsection, the term "qualified transportation fringe" includes a cash reimbursement by an employer to an employee for a benefit described in paragraph (1). The preceding sentence shall apply to a cash reimbursement for any transit pass only if a voucher or similar item which may be exchanged only for a transit pass is

not readily available for direct distribution by the employer to the employee.

(4) No constructive receipt

No amount shall be included in the gross income of an employee solely because the employee may choose between any qualified transportation fringe (other than a qualified bicycle commuting reimbursement) and compensation which would otherwise be includible in gross income of such employee.

(5) Definitions

For purposes of this subsection—

(A) Transit pass

The term "transit pass" means any pass, token, farecard, voucher, or similar item entitling a person to transportation (or transportation at a reduced price) if such transportation is—

(i) on mass transit facilities (whether or not publicly owned), or

(ii) provided by any person in the business of transporting persons for compensation or hire if such transportation is provided in a vehicle meeting the requirements of subparagraph (B)(i).

(B) Commuter highway vehicle

The term "commuter highway vehicle" means any highway vehicle—

(i) the seating capacity of which is at least 6 adults (not including the driver), and

(ii) at least 80 percent of the mileage use of which can reasonably be expected to be—

(I) for purposes of transporting employees in connection with travel between their residences and their place of employment, and

(II) on trips during which the number of employees transported for such purposes is at least ½ of the adult seating capacity of such vehicle (not including the driver).

(C) Qualified parking

The term "qualified parking" means parking provided to an employee on or near the business premises of the employer or on or near a location from which the employee commutes to work by transportation described in subparagraph (A), in a commuter highway vehicle, or by carpool. Such term shall not include any parking on or near property used by the employee for residential purposes.

(D) Transportation provided by employer

Transportation referred to in paragraph (1)(A) shall be considered to be provided by an employer if such transportation is furnished in a commuter highway vehicle operated by or for the employer.

(E) Employee

For purposes of this subsection, the term "employee" does not include an individual who is

an employee within the meaning of section 401(c)(1).

(F) Definitions related to bicycle commuting reimbursement

(i) Qualified bicycle commuting reimbursement

The term "qualified bicycle commuting reimbursement" means, with respect to any calendar year, any employer reimbursement during the 15-month period beginning with the first day of such calendar year for reasonable expenses incurred by the employee during such calendar year for the purchase of a bicycle and bicycle improvements, repair, and storage, if such bicycle is regularly used for travel between the employee's residence and place of employment.

(ii) Applicable annual limitation

The term "applicable annual limitation" means, with respect to any employee for any calendar year, the product of $20 multiplied by the number of qualified bicycle commuting months during such year.

(iii) Qualified bicycle commuting month

The term "qualified bicycle commuting month" means, with respect to any employee, any month during which such employee—

(I) regularly uses the bicycle for a substantial portion of the travel between the

employee's residence and place of employment, and

(II) does not receive any benefit described in subparagraph (A), (B), or (C) of paragraph (1).

(6) Inflation adjustment

(A) In general

In the case of any taxable year beginning in a calendar year after 1999, the dollar amounts contained in subparagraphs (A) and (B) of paragraph (2) shall be increased by an amount equal to—

(i) such dollar amount, multiplied by

(ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, by substituting "calendar year 1998" for "calendar year 2016" in subparagraph (A)(ii) thereof.

In the case of any taxable year beginning in a calendar year after 2002, clause (ii) shall be applied by substituting "calendar year 2001" for "calendar year 1998" for purposes of adjusting the dollar amount contained in paragraph (2)(A).

(B) Rounding

If any increase determined under subparagraph (A) is not a multiple of $5, such increase shall be rounded to the next lowest multiple of $5.

(7) Coordination with other provisions

For purposes of this section, the terms "working condition fringe" and "de minimis fringe" shall not include any qualified transportation fringe (determined without regard to paragraph (2)).

(8) Suspension of qualified bicycle commuting reimbursement exclusion

Paragraph (1)(D) shall not apply to any taxable year beginning after December 31, 2017, and before January 1, 2026.

* * * * *

5. 26 U.S.C. 274(j)(3)(A) provides:

PART IX—ITEMS NOT DEDUCTIBLE [INTERNAL REVENUE CODE]

Disallowance of certain entertainment, etc., expenses

(j) Employee achievement awards

(3) Definitions

For purposes of this subsection—

(A) Employee achievement award

(i) In general

The term "employee achievement award" means an item of tangible personal property which is—

(I) transferred by an employer to an employee for length of service achievement or safety achievement.

(II) awarded as part of a meaningful presentation, and

(III) awarded under conditions and circumstances that do not create a significant likelihood of the payment of the disguised compensation.

(ii) Tangible personal property

For purposes of clause (i), the term "tangible personal property" shall not include—

(I) cash, cash equivalents, gift cards, gift coupons, or gift certificates (other than arrangements conferring only the right to select and receive tangible personal property from a limited array of such items preselected or pre-approved by the employer), or

(II) vacations, meals, lodging, tickets to theater or sporting events, stocks, bonds, other securities, and other similar items.

6. 26 U.S.C. 3121 (2012 & Supp. IV 2016) provides:

Subchapter C—General Provisions [FICA]

Definitions

(a) Wages

For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term shall not include—

(1) in the case of the taxes imposed by sections 3101(a) and 3111(a) that part of the remuneration which, after remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) with respect to employment has been paid to an individual by an employer during the calendar year with respect to which such contribution and benefit base is effective, is paid to such individual by such employer during such calendar year. If an employer (hereinafter referred to as successor employer) during any calendar year acquires substantially all the property used in a trade or business of another employer (hereinafter referred to as a predecessor), or used in a separate unit of a trade or business of a predecessor, and immediately after the acquisition employs in his trade or business an individual who immediately prior to the acquisition was employed in the trade or business of such predecessor, then, for the purpose of determining whether the successor employer has paid remunera-

tion (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) to such individual during such calendar year, any remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment paid (or considered under this paragraph as having been paid) to such individual by such predecessor during such calendar year and prior to such acquisition shall be considered as having been paid by such successor employer;

(2) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of—

(A) sickness or accident disability (but, in the case of payments made to an employee or any of his dependents, this subparagraph shall exclude from the term "wages" only payments which are received under a workman's compensation law), or

(B) medical or hospitalization expenses in connection with sickness or accident disability, or

(C) death, except that this paragraph does not apply to a payment for group-term life insurance to the extent that such payment is includible in the gross income of the employee;

[(3) Repealed. Pub. L. 98–21, title III, § 324(a)(3)(B), Apr. 20, 1983, 97 Stat. 123]

(4) any payment on account of sickness or accident disability, or medical or hospitalization expenses in connection with sickness or accident disability, made by an employer to, or on behalf of, an employee after the expiration of 6 calendar months following the last calendar month in which the employee worked for such employer;

(5) any payment made to, or on behalf of, an employee or his beneficiary—

(A) from or to a trust described in section 401(a) which is exempt from tax under section 501(a) at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust,

(B) under or to an annuity plan which, at the time of such payment, is a plan described in section 403(a),

(C) under a simplified employee pension (as defined in section 408(k)(1)), other than any contributions described in section 408(k)(6),

(D) under or to an annuity contract described in section 403(b), other than a payment for the purchase of such contract which is made by rea-

son of a salary reduction agreement (whether evidenced by a written instrument or otherwise),

(E) under or to an exempt governmental deferred compensation plan (as defined in subsection (v)(3)),

(F) to supplement pension benefits under a plan or trust described in any of the foregoing provisions of this paragraph to take into account some portion or all of the increase in the cost of living (as determined by the Secretary of Labor) since retirement but only if such supplemental payments are under a plan which is treated as a welfare plan under section 3(2)(B)(ii) of the Employee Retirement Income Security Act of 1974,

(G) under a cafeteria plan (within the meaning of section 125) if such payment would not be treated as wages without regard to such plan and it is reasonable to believe that (if section 125 applied for purposes of this section) section 125 would not treat any wages as constructively received,

(H) under an arrangement to which section 408(p) applies, other than any elective contributions under paragraph (2)(A)(i) thereof, or

(I) under a plan described in section 457(e)(11)(A)(ii) and maintained by an eligible employer (as defined in section 457(e)(1));

(6) the payment by an employer (without deduction from the remuneration of the employee)—

(A) of the tax imposed upon an employee under section 3101, or

(B) of any payment required from an employee under a State unemployment compensation law,

with respect to remuneration paid to an employee for domestic service in a private home of the employer or for agricultural labor;

(7)(A) remuneration paid in any medium other than cash to an employee for service not in the course of the employer's trade or business or for domestic service in a private home of the employer;

(B) cash remuneration paid by an employer in any calendar year to an employee for domestic service in a private home of the employer (including domestic service on a farm operated for profit), if the cash remuneration paid in such year by the employer to the employee for such service is less than the applicable dollar threshold (as defined in subsection (x)) for such year;

(C) cash remuneration paid by an employer in any calendar year to an employee for service not in the course of the employer's trade or business, if the cash remuneration paid in such year by the employer to the employee for such service is less than $100. As used in this subparagraph, the term "service not in the course of the employer's trade or business" does not include domestic service in a private home of the employer and does not include service described in subsection (g)(5);

(8)(A) remuneration paid in any medium other than cash for agricultural labor;

(B) cash remuneration paid by an employer in any calendar year to an employee for agricultural labor unless—

(i) the cash remuneration paid in such year by the employer to the employee for such labor is $150 or more, or

(ii) the employer's expenditures for agricultural labor in such year equal or exceed $2,500,

except that clause (ii) shall not apply in determining whether remuneration paid to an employee constitutes "wages" under this section if such employee (I) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (II) commutes daily from his permanent residence to the farm on which he is so employed, and (III) has been employed in agriculture less than 13 weeks during the preceding calendar year;

[(9) Repealed. Pub. L. 98–21, title III, § 324(a)(3)(B), Apr. 20, 1983, 97 Stat. 123]

(10) remuneration paid by an employer in any calendar year to an employee for service described in subsection (d)(3)(C) (relating to home workers), if the cash remuneration paid in such year by the employer to the employee for such service is less than $100;

(11) remuneration paid to or on behalf of an employee if (and to the extent that) at the time of the payment of such remuneration it is reasonable to believe that a corresponding deduction is allowable under section 217 (determined without regard to section 274(n));

(12)(A) tips paid in any medium other than cash;

(B) cash tips received by an employee in any calendar month in the course of his employment by an employer unless the amount of such cash tips is $20 or more;

(13) any payment or series of payments by an employer to an employee or any of his dependents which is paid—

(A) upon or after the termination of an employee's employment relationship because of (i) death, or (ii) retirement for disability, and

(B) under a plan established by the employer which makes provision for his employees generally or a class or classes of his employees (or for such employees or class or classes of employees and their dependents),

other than any such payment or series of payments which would have been paid if the employee's employment relationship had not been so terminated;

(14) any payment made by an employer to a survivor or the estate of a former employee after the calendar year in which such employee died;

(15) any payment made by an employer to an employee, if at the time such payment is made such employee is entitled to disability insurance benefits under section 223(a) of the Social Security Act and such entitlement commenced prior to the calendar year in which such payment is made, and if such employee did not perform any services for such employer during the period for which such payment is made;

(16) remuneration paid by an organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)) or under section 521 in any calendar year to an employee for service rendered in the employ of such organization, if the remuneration paid in such year by the organization to the employee for such service is less than $100;

[(17) Repealed. Pub. L. 113–295, div. A, title II, § 221(a)(19)(B)(iv), Dec. 19, 2014, 128 Stat. 4040]

(18) any payment made, or benefit furnished, to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127, 129, 134(b)(4), or 134(b)(5);

(19) the value of any meals or lodging furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119;

(20) any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 108(f)(4), 117, or 132;

(21) in the case of a member of an Indian tribe, any remuneration on which no tax is imposed by this chapter by reason of section 7873 (relating to income derived by Indians from exercise of fishing rights);

(22) remuneration on account of—

(A) a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b)), or

(B) any disposition by the individual of such stock; or

(23) any benefit or payment which is excludable from the gross income of the employee under section 139B(b).

Nothing in the regulations prescribed for purposes of chapter 24 (relating to income tax withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "wages" in the regulations prescribed for purposes of this chapter. Except as otherwise provided in regulations prescribed by the Secretary, any third party which makes a payment included in wages solely by reason of the parenthetical matter contained in subparagraph (A) of paragraph (2) shall be treated

for purposes of this chapter and chapter 22 as the employer with respect to such wages.

(b) Employment

For purposes of this chapter, the term "employment" means any service, of whatever nature, performed (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, or (B) outside the United States by a citizen or resident of the United States as an employee for an American employer (as defined in subsection (h)), or (C) if it is service, regardless of where or by whom performed, which is designated as employment or recognized as equivalent to employment under an agreement entered into under section 233 of the Social Security Act; except that such term shall not include—

(1) service performed by foreign agricultural workers lawfully admitted to the United States from the Bahamas, Jamaica, and the other British West Indies, or from any other foreign country or possession thereof, on a temporary basis to perform agricultural labor;

(2) domestic service performed in a local college club, or local chapter of a college fraternity or so-

rority, by a student who is enrolled and is regularly attending classes at a school, college, or university;

(3)(A) service performed by a child under the age of 18 in the employ of his father or mother;

(B) service not in the course of the employer's trade or business, or domestic service in a private home of the employer, performed by an individual under the age of 21 in the employ of his father or mother, or performed by an individual in the employ of his spouse or son or daughter; except that the provisions of this subparagraph shall not be applicable to such domestic service performed by an individual in the employ of his son or daughter if—

(i) the employer is a surviving spouse or a divorced individual and has not remarried, or has a spouse living in the home who has a mental or physical condition which results in such spouse's being incapable of caring for a son, daughter, stepson, or stepdaughter (referred to in clause (ii)) for at least 4 continuous weeks in the calendar quarter in which the service is rendered, and

(ii) a son, daughter, stepson, or stepdaughter of such employer is living in the home, and

(iii) the son, daughter, stepson, or stepdaughter (referred to in clause (ii)) has not attained age 18 or has a mental or physical condition which requires the personal care and supervision of an adult for at least 4 continuous weeks in the calendar quarter in which the service is rendered;

(4) service performed by an individual on or in connection with a vessel not an American vessel, or on or in connection with an aircraft not an American aircraft, if (A) the individual is employed on and in connection with such vessel or aircraft, when outside the United States and (B)(i) such individual is not a citizen of the United States or (ii) the employer is not an American employer;

(5) service performed in the employ of the United States or any instrumentality of the United States, if such service—

(A) would be excluded from the term "employment" for purposes of this title if the provisions of paragraphs (5) and (6) of this subsection as in effect in January 1983 had remained in effect, and

(B) is performed by an individual who—

(i) has been continuously performing service described in subparagraph (A) since December 31, 1983, and for purposes of this clause—

(I) if an individual performing service described in subparagraph (A) returns to the performance of such service after being separated therefrom for a period of less than 366 consecutive days, regardless of whether the period began before, on, or after December 31, 1983, then such service shall be considered continuous,

(II) if an individual performing service described in subparagraph (A) returns to the performance of such service after being detailed or transferred to an international organization as described under section 3343 of subchapter III of chapter 33 of title 5, United States Code, or under section 3581 of chapter 35 of such title, then the service performed for that organization shall be considered service described in subparagraph (A),

(III) if an individual performing service described in subparagraph (A) is reemployed or reinstated after being separated from such service for the purpose of accepting employment with the American Institute in Taiwan as provided under section 3310 of chapter 48 of title 22, United States Code, then the service performed for that Institute shall be considered service described in subparagraph (A),

(IV) if an individual performing service described in subparagraph (A) returns to the performance of such service after performing service as a member of a uniformed service (including, for purposes of this clause, service in the National Guard and temporary service in the Coast Guard Reserve) and after exercising restoration or reemployment rights as provided under chapter 43 of title 38, United States Code, then the service so performed as a member

of a uniformed service shall be considered service described in subparagraph (A), and

(V) if an individual performing service described in subparagraph (A) returns to the performance of such service after employment (by a tribal organization) to which section 105(e)(2)[1] of the Indian Self-Determination Act applies, then the service performed for that tribal organization shall be considered service described in subparagraph (A); or

(ii) is receiving an annuity from the Civil Service Retirement and Disability Fund, or benefits (for service as an employee) under another retirement system established by a law of the United States for employees of the Federal Government (other than for members of the uniformed service);

except that this paragraph shall not apply with respect to any such service performed on or after any date on which such individual performs—

(C) service performed as the President or Vice President of the United States,

(D) service performed—

(i) in a position placed in the Executive Schedule under sections 5312 through 5317 of title 5, United States Code,

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[1] See References in Text note below.

(ii) as a noncareer appointee in the Senior Executive Service or a noncareer member of the Senior Foreign Service, or

(iii) in a position to which the individual is appointed by the President (or his designee) or the Vice President under section 105(a)(1), 106(a)(1), or 107 (a)(1) or (b)(1) of title 3, United States Code, if the maximum rate of basic pay for such position is at or above the rate for level V of the Executive Schedule,

(E) service performed as the Chief Justice of the United States, an Associate Justice of the Supreme Court, a judge of a United States court of appeals, a judge of a United States district court (including the district court of a territory), a judge of the United States Court of Federal Claims, a judge of the United States Court of International Trade, a judge of the United States Tax Court, a United States magistrate judge, or a referee in bankruptcy or United States bankruptcy judge,

(F) service performed as a Member, Delegate, or Resident Commissioner of or to the Congress,

(G) any other service in the legislative branch of the Federal Government if such service—

(i) is performed by an individual who was not subject to subchapter III of chapter 83 of title 5, United States Code, or to another retirement system established by a law of the United States for employees of the Federal Government (other than for members of the uniformed services), on December 31, 1983, or

(ii) is performed by an individual who has, at any time after December 31, 1983, received a lump-sum payment under section 8342(a) of title 5, United States Code, or under the corresponding provision of the law establishing the other retirement system described in clause (i), or

(iii) is performed by an individual after such individual has otherwise ceased to be subject to subchapter III of chapter 83 of title 5, United States Code (without having an application pending for coverage under such subchapter), while performing service in the legislative branch (determined without regard to the provisions of subparagraph (B) relating to continuity of employment), for any period of time after December 31, 1983,

and for purposes of this subparagraph (G) an individual is subject to such subchapter III or to any such other retirement system at any time only if (a) such individual's pay is subject to deductions, contributions, or similar payments (concurrent with the service being performed at that time) under section 8334(a) of such title 5 or the corresponding provision of the law establishing such other system, or (in a case to which section 8332(k)(1) of such title applies) such individual is making payments of amounts equivalent to such deductions, contributions, or similar payments while on leave without pay, or (b) such individual is receiving an annuity from the Civil Service Retirement and Disability Fund, or is receiving benefits (for service as an employee) under another retirement system established by a law of

the United States for employees of the Federal Government (other than for members of the uniformed services), or

(H) service performed by an individual—

(i) on or after the effective date of an election by such individual, under section 301 of the Federal Employees' Retirement System Act of 1986, section 307 of the Central Intelligence Agency Retirement Act (50 U.S.C. 2157), or the Federal Employees' Retirement System Open Enrollment Act of 1997[2] to become subject to the Federal Employees' Retirement System provided in chapter 84 of title 5, United States Code, or

(ii) on or after the effective date of an election by such individual, under regulations issued under section 860 of the Foreign Service Act of 1980, to become subject to the Foreign Service Pension System provided in subchapter II of chapter 8 of title I of such Act;

(6) service performed in the employ of the United States or any instrumentality of the United States if such service is performed—

(A) in a penal institution of the United States by an inmate thereof;

(B) by any individual as an employee included under section 5351(2) of title 5, United States Code (relating to certain interns, student nurses, and other student employees of hospitals

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[2] So in original. Probably should be followed by a comma.

of the Federal Government), other than as a medical or dental intern or a medical or dental resident in training; or

(C) by any individual as an employee serving on a temporary basis in case of fire, storm, earthquake, flood, or other similar emergency;

(7) service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned thereby, except that this paragraph shall not apply in the case of—

(A) service which, under subsection (j), constitutes covered transportation service,

(B) service in the employ of the Government of Guam or the Government of American Samoa or any political subdivision thereof, or of any instrumentality of any one or more of the foregoing which is wholly owned thereby, performed by an officer or employee thereof (including a member of the legislature of any such Government or political subdivision), and, for purposes of this title with respect to the taxes imposed by this chapter—

(i) any person whose service as such an officer or employee is not covered by a retirement system established by a law of the United States shall not, with respect to such service, be regarded as an employee of the United States or any agency or instrumentality thereof, and

(ii) the remuneration for service described in clause (i) (including fees paid to a public official) shall be deemed to have been paid by the Government of Guam or the Government of American Samoa or by a political subdivision thereof or an instrumentality of any one or more of the foregoing which is wholly owned thereby, whichever is appropriate,

(C) service performed in the employ of the District of Columbia or any instrumentality which is wholly owned thereby, if such service is not covered by a retirement system established by a law of the United States (other than the Federal Employees Retirement System provided in chapter 84 of title 5, United States Code); except that the provisions of this subparagraph shall not be applicable to service performed—

(i) in a hospital or penal institution by a patient or inmate thereof;

(ii) by any individual as an employee included under section 5351(2) of title 5, United States Code (relating to certain interns, student nurses, and other student employees of hospitals of the District of Columbia Government), other than as a medical or dental intern or as a medical or dental resident in training;

(iii) by any individual as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood or other similar emergency; or

(iv) by a member of a board, committee, or council of the District of Columbia, paid on a per diem, meeting, or other fee basis,

(D) service performed in the employ of the Government of Guam (or any instrumentality which is wholly owned by such Government) by an employee properly classified as a temporary or intermittent employee, if such service is not covered by a retirement system established by a law of Guam; except that (i) the provisions of this subparagraph shall not be applicable to services performed by an elected official or a member of the legislature or in a hospital or penal institution by a patient or inmate thereof, and (ii) for purposes of this subparagraph, clauses (i) and (ii) of subparagraph (B) shall apply,

(E) service included under an agreement entered into pursuant to section 218 of the Social Security Act, or

(F) service in the employ of a State (other than the District of Columbia, Guam, or American Samoa), of any political subdivision thereof, or of any instrumentality of any one or more of the foregoing which is wholly owned thereby, by an individual who is not a member of a retirement system of such State, political subdivision, or instrumentality, except that the provisions of this subparagraph shall not be applicable to service performed—

(i) by an individual who is employed to relieve such individual from unemployment;

(ii) in a hospital, home, or other institution by a patient or inmate thereof;

(iii) by any individual as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or other similar emergency;

(iv) by an election official or election worker if the remuneration paid in a calendar year for such service is less than $1,000 with respect to service performed during any calendar year commencing on or after January 1, 1995, ending on or before December 31, 1999, and the adjusted amount determined under section 218(c)(8)(B) of the Social Security Act for any calendar year commencing on or after January 1, 2000, with respect to service performed during such calendar year; or

(v) by an employee in a position compensated solely on a fee basis which is treated pursuant to section 1402(c)(2)(E) as a trade or business for purposes of inclusion of such fees in net earnings from self-employment;

for purposes of this subparagraph, except as provided in regulations prescribed by the Secretary, the term "retirement system" has the meaning given such term by section 218(b)(4) of the Social Security Act;

(8)(A) service performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by

such order, except that this subparagraph shall not apply to service performed by a member of such an order in the exercise of such duties, if an election of coverage under subsection (r) is in effect with respect to such order, or with respect to the autonomous subdivision thereof to which such member belongs;

(B) service performed in the employ of a church or qualified church-controlled organization if such church or organization has in effect an election under subsection (w), other than service in an unrelated trade or business (within the meaning of section 513(a));

(9) service performed by an individual as an employee or employee representative as defined in section 3231;

(10) service performed in the employ of—

(A) a school, college, or university, or

(B) an organization described in section 509(a)(3) if the organization is organized, and at all times thereafter is operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of a school, college, or university and is operated, supervised, or controlled by or in connection with such school, college, or university, unless it is a school, college, or university of a State or a political subdivision thereof and the services performed in its employ by a student referred to in section 218(c)(5) of the Social Security Act are covered under the agreement between the Commissioner of Social Secu-

rity and such State entered into pursuant to section 218 of such Act;

if such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university;

(11) service performed in the employ of a foreign government (including service as a consular or other officer or employee or a nondiplomatic representative);

(12) service performed in the employ of an instrumentality wholly owned by a foreign government—

(A) if the service is of a character similar to that performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and

(B) if the Secretary of State shall certify to the Secretary of the Treasury that the foreign government, with respect to whose instrumentality and employees thereof exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States Government and of instrumentalities thereof;

(13) service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to State law;

(14)(A) service performed by an individual under the age of 18 in the delivery or distribution of news-

papers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

(B) service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back;

(15) service performed in the employ of an international organization, except service which constitutes "employment" under subsection (y);

(16) service performed by an individual under an arrangement with the owner or tenant of land pursuant to which—

(A) such individual undertakes to produce agricultural or horticultural commodities (including livestock, bees, poultry, and fur-bearing animals and wildlife) on such land,

(B) the agricultural or horticultural commodities produced by such individual, or the proceeds therefrom, are to be divided between such individual and such owner or tenant, and

(C) the amount of such individual's share depends on the amount of the agricultural or horticultural commodities produced;

[(17) Repealed. Pub. L. 113–295, div. A, title II, § 221(a)(99)(C)(i), Dec. 19, 2014, 128 Stat. 4052]

(18) service performed in Guam by a resident of the Republic of the Philippines while in Guam on a temporary basis as a nonimmigrant alien admitted to Guam pursuant to section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii));

(19) Service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act, as amended, and which is performed to carry out the purpose specified in subparagraph (F), (J), (M), or (Q), as the case may be;

(20) service (other than service described in paragraph (3)(A)) performed by an individual on a boat engaged in catching fish or other forms of aquatic animal life under an arrangement with the owner or operator of such boat pursuant to which—

(A) such individual does not receive any cash remuneration other than as provided in subparagraph (B) and other than cash remuneration—

(i) which does not exceed $100 per trip;

(ii) which is contingent on a minimum catch; and

(iii) which is paid solely for additional duties (such as mate, engineer, or cook) for which additional cash remuneration is traditional in the industry,

(B) such individual receives a share of the boat's (or the boats' in the case of a fishing operation involving more than one boat) catch of fish or other forms of aquatic animal life or a share of the proceeds from the sale of such catch, and

(C) the amount of such individual's share depends on the amount of the boat's (or the boats' in the case of a fishing operation involving more than one boat) catch of fish or other forms of aquatic animal life,

but only if the operating crew of such boat (or each boat from which the individual receives a share in the case of a fishing operation involving more than one boat) is normally made up of fewer than 10 individuals; or

(21) domestic service in a private home of the employer which—

(A) is performed in any year by an individual under the age of 18 during any portion of such year; and

(B) is not the principal occupation of such employee.

For purposes of paragraph (20), the operating crew of a boat shall be treated as normally made up of fewer than 10 individuals if the average size of the operating

crew on trips made during the preceding 4 calendar quarters consisted of fewer than 10 individuals.

7. 20 C.F.R. 211.2(a) provides:

PART 211—CREDITABLE RAILROAD COMPENSATION [UNDER THE RRA]

Definition of compensation.

(a) The term compensation means any form of payment made to an individual for services rendered as an employee for an employer; services performed as an employee representative; and any separation or subsistence allowance paid under any benefit schedule provided in conformance with title VII of the Regional Rail Reorganization Act of 1973 and any termination allowance paid under section 702 of that Act. Compensation may be paid as money, a commodity, a service or a privilege. However, if an employee is to be paid in any form other than money, the employer and employee must agree before the service is performed upon the following:

(1) The value of the commodity, service or privilege; and

(2) That the amount agreed upon to be paid may be paid in the form of the commodity, service or privilege.

8. 26 C.F.R. 410.5 (1938) provides:

PART 410—EMPLOYERS' TAX, EMPLOYEES' TAX, AND EMPLOYEE REPRESENTATIVES' TAX UNDER THE CARRIERS TAXING ACT OF 1937 [RRTA]

Definition of "compensation."

The term "compensation" or in something which may be means all remuneration in money, used in lieu of money (scrip and merchandise orders, for example), earned by an individual for services performed as an employee for one or more employers, or as an employee representative. The term is not confined to amounts earned or paid for active service but includes amounts earned or paid for periods during which the employee or employee representative is absent from active service. The term does not include tips, or the voluntary employer of the employee's tax, without the deduction of such tax to when compensation from the remuneration of the employee. (As to when compensation is earned, see § 410.7.)*†34

9. 26 C.F.R. 31.3231(e)-1(a)(1) provides:

Subpart C—Railroad Retirement Tax Act (Chapter 22, Internal Revenue Code of 1954)

Compensation.

(a) *Definition*—(1) The term *compensation* has the same meaning as the term *wages* in section 3121(a),

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* For statutory citation, see note to § 410.0.

† For source citation, see note to § 410.1.

determined without regard to section 3121(b)(9), except as specifically limited by the Railroad Retirement Tax Act (chapter 22 of the Internal Revenue Code) or regulation. The Commissioner may provide any additional guidance that may be necessary or appropriate in applying the definitions of sections 3121(a) and 3231(e).

No. 17-530

IN THE

Supreme Court of the United States

WISCONSIN CENTRAL LTD.; GRAND TRUNK WESTERN RAILROAD COMPANY; AND ILLINOIS CENTRAL RAILROAD COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This case presents the question whether stock is "money"—and thus whether remuneration in stock is "money remuneration" under the Railroad Retirement Tax Act (RRTA), 26 U.S.C. § 3231(e)(1).

Petitioners' opening brief demonstrated, using traditional tools of statutory construction, that the words "money remuneration" plainly exclude remuneration in stock. The ordinary meaning of "money" is a generally accepted medium of exchange. The Internal Revenue Code, as it existed in the 1930s when the RRTA was enacted, repeatedly distinguished between "stock" and "money," just as it does today. And the limited scope of the RRTA's "money remuneration" standard stands in stark contrast to the far broader tax base the same Depression-era Congress used in the Federal Insurance Contributions Act (FICA). *See* 26 U.S.C. § 3121(a) (FICA taxes "*all* remuneration for employment, including the cash value of all remuneration (including benefits) *paid in any medium other than cash.*") (emphasis added).

The government looks for ways to get around the ordinary meaning of "money." It first asks the Court to effectively delete "money" from the statute by construing "money remuneration" to mean remuneration in anything "that can be easily valued in or converted to cash." Br. 17. That interpretation would deprive the word "money" of any limiting force. Under the government's approach, land, cars, wine and baseball cards—all of which can be easily valued and sold for cash—would become "money."

The government also relies on four exemptions to Section 3231 to argue that "money remuneration" must be read broadly or these exemptions would be

surplusage. But those are just a handful of the numerous exemptions set forth in the statute, and they cannot change the meaning of the statutory definition enacted decades earlier. Moreover, the exemptions are *not* surplusage under petitioners' plain-language reading. For example, the exemption for remuneration "on account of" the exercise of qualified stock options, 26 U.S.C. § 3231(e)(12), encompasses cash payments that accompany the options' exercise—a common practice that is expressly recognized by IRS regulations, *see* 26 C.F.R. § 1.422-5(c). The same is true of the other exemptions: All encompass payments in cash or its equivalent. Whereas the government's reading would render the critical limiting term "money" surplusage, by equating "money remuneration" with "all remuneration," petitioners' reading harmonizes *all* provisions of the statute, including the exemptions the government invokes.

The government also looks to prior administrative interpretations for support. But those interpretations confirm petitioners' plain-language reading. The original IRS regulation construed the statute to encompass cash or its equivalent—*i.e.*, anything "which may be used in lieu of money" as a medium of exchange, including scrip and merchandise orders. 26 C.F.R. § 410.5 (1938). Although the government now claims that "scrip" means "stock," that reading is foreclosed by the regulation itself. Scrip is identified, along with merchandise orders, as an illustrative example of something "which can be used in lieu of money." That shows the IRS used "scrip" to refer to private currency paid to employees (a common practice during the Depression), rather than stock, which has never been "used in lieu of money."

The government's argument is, at heart, a request to amend the RRTA's "money remuneration" standard to conform to FICA's "all remuneration" standard. But the textual differences in the statutes should be respected. The railroad retirement system was meant to federalize and continue the railroads' pre-existing pension programs, which were based on salary or "pay roll," rather than on the many in-kind benefits railroad employees received. When Congress enacted Social Security, in contrast, it was writing on a blank slate.

Since the Great Depression, Congress has preserved railroad retirement as a separate and distinct retirement system that differs from Social Security in key respects: It has a narrower tax base; it imposes higher tax rates; and it provides more generous benefits for retirees. The government's policy preference—to "align" the tax bases of the two retirement systems through agency interpretation (Br. 47)—cannot override the statutory text to achieve what Congress for 80 years has refused to do.

TRANSFERS OF CORPORATE STOCK ARE NOT "MONEY REMUNERATION" UNDER THE RRTA.

A. Stock Is Not A Generally Accepted Medium Of Exchange And Thus Is Not "Money."

1. The plain meaning of "money" is a generally accepted medium of exchange. *See* Pet. Br. 21-23 (citing dictionary definitions). For that reason, stock is not money. No one buys their groceries with stock. The IRS, which requires payment of taxes in "money or its equivalent," does not accept payment of taxes in stock. *See* Rev. Ruling 76-350; 26 C.F.R. §§ 301.6311-1 & 301.6311-2.

The government argues that "money" means anything "that can be easily valued" or anything that can be "converted to cash." Br. 17. But that cannot possibly be what "money" means in the context of a federal tax statute like the RRTA. Under this definition, *everything* is money, as long as it has a value or can be sold. A car is "money" because it can be readily valued and sold for cash. So is land. So is a bottle of wine. Defining "money" to mean anything that has a value, or can be bought or sold, drains the word of meaning and deprives it of any constraining effect.

The government cites broad dictionary definitions of "money" as a person's overall wealth, or as "the representative ... of everything that can be transferred in commerce." Br. 16-17 (quoting Black's Law Dictionary 1200 (3d ed. 1933)). But "[i]n interpreting the meaning of the words in a revenue Act, [courts] look to the ordinary, everyday senses of the words," *Commissioner v. Soliman*, 506 U.S. 168, 174 (1993) (quotation marks omitted), and the government's own authorities recognize that this definition is not the word's ordinary meaning. *See* Black's Law Dictionary at 1200 ("*In its more popular sense*, 'money' means any currency, tokens, bank-notes, or other circulating medium in general use as the representative of value.") (emphasis added).

The government's proposed definition would render the limiting term "money" surplusage. No court has interpreted the RRTA this way. Both the Seventh Circuit below and the Eighth Circuit in *Union Pacific* agreed with petitioners that "money" refers to a generally accepted medium of exchange. *See* Pet. App. 4a; *Union Pac. R.R. Co. v. United States*, 865 F.3d 1045, 1049 (8th Cir. 2017). This Court has

recognized that "money . . . is a medium of exchange," *Railway Express Agency v. Virginia*, 347 U.S. 359, 365 (1954), and that treasury warrants are not "money" because they do not serve as a medium of exchange in general commerce, *Houston & Tex. Cent. R.R. Co. v. Texas*, 177 U.S. 66, 83-85 (1900); *see also Thompson v. Butler*, 95 U.S. 694, 696 (1877) (describing "money" as "a medium of exchange").

2. The government contends that, even if money means a medium of exchange, stock still is "money" because it is sometimes transferred in corporate takeovers. Br. 19. But this ignores the key words in the government's own definition—money must be "'*customarily used* as a medium of exchange.'" *Id.* (quoting *Webster's Second* at 1583) (emphasis added). A specialized use in the corporate-takeover context is not customary use in society. Moreover, even in corporate takeovers, stock is not used as a medium of exchange—rather, it is the asset that is being sold or acquired. The same is true in the context of employee compensation. When an employee is given stock in exchange for performing services, the stock is not being used as a medium of exchange, just as an employer's provision of a free lunch does not make food a medium of exchange.

The government argues that stock is money because employees of other railroads, participating in stock-option plans that differ from the plan at issue here, immediately sell their stock upon exercise and thus "experience" the option as a cash deposit. Br. 20 (quotation marks omitted). But less than half the options at issue in *this* case were exercised in that way, *see* Pet. Br. 13. Moreover, many intervening steps occur between the employer's transfer of stock and the employee's "experience" of receiving cash: the

employee must communicate with his or her broker, who must then communicate with a licensed trader, who must then locate a buyer at a specific price, consummate the sale, deduct agency fees for the transaction, and then transfer the remaining proceeds. That the employee chooses to sell his or her stock for cash does not transform stock into money. And because the cash does not come from the railroad employer, but from a third-party purchaser on the open market, it would not be "remuneration" in any event.

The government also ignores that for many years, the employee did not "experience" the stock option as cash. The employee had only a future possibility of someday acquiring stock that could potentially be sold for cash. If the stock price fell below the strike price, the option would be worthless and all the employee would "experience" would be disappointment. This is a critical difference between remuneration in cash and remuneration in stock options. The value of stock and stock options fluctuates substantially, at times dramatically. Stock is an investment property, and the strong possibility of dramatic swings in value is yet another way that stock is not, as the government claims, the "practical equivalent" of cash. Br. 20 (quotation marks omitted).

3. The original meaning of "money remuneration" is further confirmed through the 1939 Internal Revenue Code—a powerful contemporaneous indicator of what the Depression-era Congress meant when it used the word "money" in a tax statute. *See* Pet. Br. 30-31. As even the Seventh Circuit acknowledged, the Code "treats 'money' and 'stock' as different concepts." Pet. App. 4a. The government is silent in response.

The *current* tax code also repeatedly distinguishes between stock and money. *See* Pet. Br. 32-33. The government identifies a single provision where, solely for purposes of that provision, Congress expressly defined "money" to include securities. But this special definition just confirms that the *ordinary* meaning of money does not include securities. The government also cites a definition of "monetary instrument" in Title 18, but a definition of a different term from the modern criminal code casts little light on what Congress meant in the 1937 tax code.

This Court's tax cases have distinguished between "stock" and "money." *See Commissioner v. LoBue*, 351 U.S. 243, 247 (1956); *Helvering v. Credit Alliance Corp.*, 316 U.S. 107, 112 (1942). Although the government claims that in these cases the Court must have been using the word "money" in "its narrower sense," Br. 25, both cases underscore that in the context of federal tax law, just as in ordinary English, stock is not money.

At the same time the government downplays this Court's understanding of "money" in the tax context, it relies heavily on cases from state courts discussing what individual testators meant when they referred to their "money" *in their will*. Br. 22-23. All this shows is that the meaning of "money," like the meaning of any word, must be understood in context. It is hardly surprising that the word "money" may be understood by individual testators to mean different things. In fact, the cases cited by the government recognize that "[t]he word 'money' in its usual and ordinary acceptation means gold, silver, or paper money used as a circulating medium of exchange," but that sometimes the individualized intent of the testator requires departing from that ordinary

meaning and interpreting "money" more broadly, particularly in light of the presumption against partial intestacy. *Lane v. Railey*, 133 S.W.2d 74, 79 (Ky. Ct. App. 1939) (quotation marks omitted).

4. The original IRS regulation further confirms that the word "money," as used in the RRTA, excludes stock. That regulation defined "compensation" as "all remuneration in money, or in something which may be used in lieu of money (scrip and merchandise orders, for example)." 26 C.F.R. § 410.5 (1938); *see also id.* § 410.6(a) ("compensation" includes "[s]alaries, wages, commissions, fees, bonuses, and any other remuneration in money or in something which may be used in lieu of money").

The government insists that scrip means stock. Br. 37-38. But this ignores the text of the regulation, which identifies "scrip and merchandise orders" as illustrative examples of "something which may be used in lieu of money." 26 C.F.R. § 410.5 (1938). Read in context, "scrip" refers to private currency paid to employees—not to stock, which has never been "used in lieu of money." *See* Webster's New Int'l Dictionary 2249 (2d ed. 1934) (defining "scrip" as a "certificate . . . issued to circulate in lieu of government currency" and/or "by a corporation that pays wages partly in orders on a company store"); Loren Gatch, *Local Money in the United States During the Great Depression*, in 26 Essays in Econ. & Bus. Hist. 47-48 (2008) (discussing scrip as private currency); *Keokee Consol. Coke Co. v. W.W. Taylor*, 234 U.S. 224, 226 (1914) (company gave its employees "scrip . . . as an advance of monthly wages in payment for labor performed" that was redeemable in merchandise at the company store).

The meaning of "scrip" is further confirmed by 26 C.F.R. § 410.6(a) (1938), which provides additional examples of remuneration that "may be used in lieu of money," and does not mention stock. The Labor Department expressed the same understanding when it prohibited employers from paying employees in scrip. *See* 13 Fed. Reg. 419, 421 (Jan. 30, 1948) ("Scrip, tokens, credit cards, 'dope checks,' coupons, and similar devices are not proper mediums of payment under" the Fair Labor Standards Act.).

The government's reliance on Railroad Retirement Board interpretations is misplaced. Br. 38-41. The Board is not the agency statutorily authorized to administer the RRTA, so its views are not entitled to deference. More fundamentally, the Board's regulations support *petitioners* because they provide that non-money remuneration may be treated as "compensation" for Railroad Retirement Act benefits purposes *only if* the employer and employee have agreed in advance to do so—and *only if* they have reached an agreement as to the value of the "commodity, service, or privilege" prior to the employee's performance of services. *See* 20 C.F.R. § 222.2 (1938); 20 C.F.R. § 211.2 (current). Even though such an agreement requires overpayment of RRTA taxes, employees sometimes do so to increase their benefits upon retirement.

These regulations confirm petitioners' interpretation, because they reflect that the statute does *not* encompass non-money remuneration. If it did, there would be no need to obtain consent; the items would be taxed automatically. The Board itself has conceded that the reason it needs consent is because these items are *excluded* by the words "money remuneration." In Board Opinion L-1986-82, which

the government carefully avoids citing, the Board explained that, unlike FICA, the RRTA does not "provide that compensation includes remuneration paid in any medium." *Id.* at 6 (quotation marks omitted). Thus, "absent a change in the definition of compensation in the RRTA," non-money remuneration "would not be included in compensation under the RRTA unless the employer and employee first agree to [its] dollar value . . . and then agree that this dollar value shall be part of the employee's compensation package." *Id.*[1]

In fact, if the Board's regulations and opinions controlled this case, petitioners would win because they never consented to treat stock as compensation. Nor did they agree on a value before the employees performed the services. That would have been impossible, because the options could not be exercised for many years and the future value of the stock could not have been known at the time the options were granted.

Finally, the government overreaches in claiming that, in light of these administrative interpretations, Congress has acquiesced in the view that stock is money and hence taxable. Br. 42. The bar for acquiescence is very high and not met here. *See Rapanos v. United States*, 547 U.S. 715, 751 (2006). That is especially true because, as explained above,

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[1] The Board's 1938 opinion supports petitioners for the same reason: It holds that stock may be treated as "compensation" only if the employer and employee have agreed to do so, and agreed on a valuation. Opinion L-1938-440, at 2. And the Board's 2005 opinion does nothing more than rely on the current IRS regulation. L-2005-25, at 5-7.

the administrative opinions actually support *petitioners'* interpretation.[2]

B. The Exemptions Do Not Change The Plain Meaning Of "Money Remuneration" And Are Not Surplusage.

The government argues that various exemptions in Section 3231 perform a work of alchemy by transforming stock into "money." The government identifies four exemptions that it claims would be superfluous under petitioners' plain-language reading. Br. 26-34. But any inference the government seeks to draw from the exemptions cannot change the original meaning of "money remuneration." The canon against surplusage is merely an interpretive aid where the text is ambiguous, which is not the case here. Moreover, all the exemptions encompass payments in cash or cash equivalents, and thus are not surplusage under petitioners' reading, as the Eighth Circuit recognized. *See Union Pacific*, 865 F.3d at 1050-51; *see also* Amicus Br. of CSX Corp., *et al.* at 4-15.

1. As originally enacted, Section 3231 was short and simple. It defined "compensation" to mean "money remuneration" and had only two exemptions: one for tips, the other for the employer's payment of the employee's share of the RRTA tax. *See* 50 Stat. 435, 436 (1937). Those remained the only exemptions from 1937 until 1976, and both reinforce the original

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[2] The government wrongly implies (Br. 7) that the railroads' paying RRTA taxes on stock reflects an acknowledgment that stock was taxable. In fact, it is a responsible corporate decision to pay the tax and seek refunds, rather than refuse to pay and force the IRS to commence proceedings. Every refund action proceeds this way.

meaning of "money remuneration" as remuneration in cash or cash equivalents, because they both involve cash or cash-equivalent payments.

In recent years, Congress has enacted many exemptions further restricting the RRTA's tax base. Some of those exemptions are set forth in subsections of Section 3231(e) itself. *E.g.*, (e)(1)-(e)(12). Others are found in other sections of the tax code and incorporated through cross-reference. *E.g.*, (e)(5) (cross-referencing 26 U.S.C. §§ 74(c), 108(f)(4), 117, 132). And even the cross-referenced provisions cross-reference *other* provisions. *E.g.*, 26 U.S.C. § 108(f)(4) (cross-referencing provisions of the Public Health Service Act).

The government does not dispute that virtually all of these exemptions apply to payments in cash or cash equivalents—and thus are fully consistent with the plain meaning of "money remuneration." Instead, the government seizes on four specific exemptions to argue by inference that "money remuneration" must mean "all remuneration" or else those exemptions would be superfluous. But this is no way to construe a tax statute. As the RRTA illustrates, Congress typically writes a tax statute by establishing a tax base, followed by a list of exemptions that expand over time. *See, e.g.*, 26 U.S.C. § 61 (defining "gross income); *id.* §§ 101-140 (exemptions to "gross income"). The purpose of the exemptions is to *limit* the tax base. Here, however, the government uses a handful of exemptions as a way of *expanding* the tax base well beyond its plain meaning. Any tax statute could be distorted through this method of interpretation, as tax statutes often have dozens of exemptions, some of which, like the qualified stock option exemption discussed below, may have been drafted with a

different tax statute in mind and then peppered throughout the tax code in an abundance of caution to ensure uniformity of tax treatment. Even if this interpretive approach made sense in a different context, it makes little sense here. Drawing inferences from a handful of cherry-picked exemptions to distort the plain meaning of the tax base itself allows a very small tail to wag a very big dog.

2. The government's inference-by-exemption argument is particularly ill-suited to *this* case, where the four exemptions in question were enacted decades after the statutory language at issue. This Court gives words in a statute their "ordinary meaning . . . as understood when the [statute] was enacted." *Carcieri v. Salazar*, 555 U.S. 379, 388 (2009).

The government cites cases to support the proposition that "later-enacted statutory language can clarify the meaning of pre-existing provisions," Br. 28, but those cases arose in very different contexts. In *United States v. Quality Stores*, 134 S. Ct. 1395, 1400 (2014), for example, the statutory text in question was ambiguous, so the Court looked to an exemption for guidance. Here, in contrast, the government is trying to use the exemptions to *override* the plain meaning of "money remuneration" as unambiguously excluding stock. *See also W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 100 (1991) (considering later-enacted amendments to construe "ambiguous" statutory term). Other cases involve "repeal by implication of a legal disposition implied by a statutory text" (*United States v. Fausto*, 484 U.S. 439, 453 (1988)), and the difficulty in reconciling two seemingly conflicting statutes (*United States v. Estate of Romani*, 523 U.S. 517, 530 (1998)).

A far more relevant case is *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), where the Court declined to do what the government requests here: interpret a statutory provision in light of later-enacted subsections to the statute. The Court held that the "later enacted" subsections are "beside the point" because "[t]hey do not declare the meaning of earlier law" and "do not reflect any direct focus by Congress upon the meaning of the earlier enacted provisions." *Id.* at 237. The same reasoning applies here. None of the exemptions the government cites purports to alter the basic definition of "compensation"—and none reflects *any* focus by Congress, let alone a "direct" focus, on the meaning of "money remuneration."

3. The government's argument is further negated because each of the exemptions encompasses payments in cash or its equivalent. Thus, they are *not* surplusage when "money remuneration" is given its plain meaning.

Subsection 3231(e)(12) exempts remuneration "on account of" the exercise of qualified stock options. The government argues that because this subsection exempts some stock options, "money remuneration" must necessarily include stock options. But as the government concedes, cash payments sometimes accompany the exercise of qualified stock options. *See* Br. 29; *Union Pacific*, 865 F.3d at 1050 (noting government concession "that money is sometimes received when a qualified stock option is exercised"). That happens when employers transfer cash to the employee along with the stock, *see* 26 C.F.R. § 1.422-5(c), or when the employer transfers cash in lieu of a fractional share. *See Union Pacific*, 865 F.3d at 1050.

The government's only response is to claim that the exemption is not "naturally read" to exclude the cash payments that accompany the exercise of stock options. Br. 29. But the provision is not limited to the stock itself. It exempts *any* remuneration "on account of" the exercise of qualified stock options, 26 U.S.C. § 3231(e)(12)—language that plainly encompasses the cash payments that are triggered by the employee's exercise of the options and the transfer of the shares. Although the government contends that, under petitioners' interpretation, the exemption would "reach only small cash payments," Br. 30, "it is [the Court's] function to give the statute the effect its language suggests, however modest that may be." *Digital Realty Trust v. Somers*, 138 S. Ct. 767, 780 (2018) (quotation marks and alteration omitted).

The government claims that the exemption's history and purpose support an inference that stock would otherwise be taxable under the RRTA. Br. 31. But it is mistaken. The exemption applies to qualified stock options (QSOs). In the early 2000s, the IRS considered the tax treatment of QSOs. The IRS took the position that, if an employee sold his or her stock before holding it for a specified time (a "disqualifying disposition"), the spread at exercise and some additional appreciation should be taxable as "wages" under FICA. *See* IRS Notice 2001-14 (Feb. 5, 2001); 66 Fed. Reg. 57,023 (Nov. 14, 2001) (proposed regulations). Congress disagreed, so it amended FICA to exempt these transfers of stock and cash, and then inserted the same exemption into every federal employment-tax statute, including the RRTA.

This approach was consistent with Congress's customary practice of inserting identical exemptions into multiple federal tax statutes at the same time to

ensure uniformity of result, even at the cost of occasional redundancy or surplusage. Here, the report from the Joint Committee on Taxation shows the exemption's inclusion in the RRTA was an afterthought. The report presents the exemption as an exemption to FICA—and then mentions *in a footnote*, without any discussion, that the same exemption would be placed in the RRTA. *See General Explanation of Tax Legislation Enacted in the 108th Congress* at 219 n.378.

It would be extraordinary to conclude that in 2004, after nearly 70 straight years of "money remuneration" being limited to cash or cash equivalents, Congress, through a small, rifle-shot amendment aimed at addressing a discrete problem that had arisen under a different statute, ended up making a profound change in the RRTA's tax base, by changing "money remuneration" to "all remuneration." *See Almendarez-Torres*, 523 U.S. at 237 (later-enacted amendments do not cast light on original meaning absent "direct focus" by Congress); *Warner v. Goltra*, 293 U.S. 155, 159 (1934) (later-enacted exclusion does not change original meaning of statutory term).

Subsection 3231(e)(5) cross-references four Code provisions and excludes numerous items from taxation. The government does not dispute that the vast majority of subsection (e)(5)'s coverage is not surplusage under petitioners' reading. Instead, it zeroes in on employee achievement awards, revealing just how far it must stretch in an effort to establish surplusage. Many employers give their employees cash equivalents in the form of gift cards that can be used in lieu of cash (Amazon gift cards, for example). The government disagrees with the Eighth Circuit,

see Union Pacific, 865 F.3d at 1051, that these cash equivalents are not covered by the exemption. It reasons that subsection (e)(5) cross-references Section 74(c), which cross-references Section 274(j), which looks to subsection 274(j)(3)(A)(ii), which addresses gift cards. But that final subsection—on which the government's argument ultimately rests—was enacted in 2017, long after the tax years at issue in this case. The suggestion that this amendment (to a provision two cross-references removed from the RRTA itself) sheds light on the meaning of "money remuneration" is a bridge too far.

Subsection 3231(e)(9) exempts, among other things, cash payments related to meals. *See* 26 U.S.C. § 119. The government does not dispute that this exemption has meaning under petitioners' reading of "money remuneration," in that it exempts the cash payments employers make to their employees if the employees are required to pay back that money in exchange for meals. *See* Br. 33. Although the government comments that it would be "strange" for Congress to have worded the exemption broadly if it simply intended to target these payments, *id.*, Congress often frames exemptions broadly to avoid doubt—and to guard against situations where amendments to cross-referenced provisions could have a ripple effect.

Subsection 3231(e)(1)(i) exempts "any payment" made to, or on behalf of, employees on account of sickness or accident. The government admits that this subsection is not surplusage under petitioners' reading, as a "payment" to employees plainly is "money remuneration." And if the government is right that the language concerning payments made "on behalf of" the employee has limited "practical

effect" under petitioners' reading, Br. 34, the same is true on the government's reading: The significance of this language turns on what constitutes "remuneration," not "money."

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Even if the government were correct that a handful of the exemptions do limited work under petitioners' interpretation, the government's interpretation does far greater damage to the statute by rendering "money"—the critical limiting term in the tax base itself—superfluous. "[A]s between one interpretation that would render statutory text superfluous and another that would render it meaningful yet limited, we think the latter more faithful to the statute Congress wrote." *Clark v. Rameker*, 134 S. Ct. 2242, 2249 (2014).

C. Giving "Money Remuneration" Its Plain Meaning Respects The Textual Differences With FICA, And Is Consistent With The RRTA's History And Purpose.

1. Whereas the RRTA taxes "compensation," which it defines as "money remuneration," 26 U.S.C. § 3231(e)(1), FICA taxes "wages," which it defines as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." 26 U.S.C. § 3121(a). In the RRTA, Congress intended to tax only a subset of all the remuneration railroad employees received—and it omitted the critical language it included in FICA extending the tax base to encompass remuneration "paid in any medium other than cash."

This Court ordinarily "presume[s] differences in language like this convey differences in meaning." *Henson v. Santander Consumer USA*, 137 S. Ct. 1718,

1723 (2017). But after spending 48 pages urging the Court to appreciate the similarities between the RRTA and FICA, at the end of its brief the government switches gears and argues that the Court should *disregard* the critical textual differences in the tax bases because the RRTA and FICA are not "the same statute or statutes that were derived from one another." Br. 49; *id.* at 50 (suggesting that "money remuneration" and "all remuneration" be treated as "synonyms").

The government cannot have it both ways. The same Depression-era Congress enacted, almost simultaneously, two retirement schemes with a number of similarities—but with strikingly different tax bases. The language Congress chose should be given meaning and the textual differences should be respected, particularly when those textual differences appear in the very *definitions* of the key statutory terms.

2. The government does not seriously dispute that the RRTA's historical context shows that Congress sought to mirror the pre-existing salary-based pension system that was standard throughout the railroad industry. *See* Railroad Retirement Board Handbook at 1 (explaining that the RRTA's purpose was to "continue and broaden *the existing* railroad programs") (emphasis added). Although the government questions why Congress would use a struggling pension system as a model, Congress addressed concerns about underfunding by setting appropriate tax rates and benefit levels, while keeping the industry's historic salary-based structure in place.

The government's discussion of legislative history relies on unenacted bills that were rejected in favor of

what became an invalidated version of the railroad benefits statute. Br. 35-36. The government also notes that the RRTA's predecessor provided that "compensation" does not include "free transportation." *Id.* at 36. But free transportation was often provided in the form of cash reimbursements—that is, money "issued to persons entitled to free transportation." 1 Fed. Reg. 1,576, 1,577 (Oct. 13, 1936). Moreover, Congress deleted the reference to "free transportation" when it enacted the RRTA, suggesting that Congress deemed it unnecessary because it was already excluded by the phrase "money remuneration."

The government concedes another powerful and telling indicator of the meaning of "money remuneration": Congress projected the tax revenues the RRTA would generate based solely on the "pay roll" of railroad employers. *See* Pet. Br. 26. The government speculates that Congress may have viewed the pay roll data as a mere "starting point." Br. 44. But the fact that Congress, at the very moment it enacted the RRTA, determined the future tax revenue based solely on compensation in cash or its equivalent—and *not* on stock or other non-money benefits—confirms that Congress used the word "money" in its ordinary, everyday sense.

3. The government strives to create the false impression that Social Security/FICA and the railroad retirement system provide "identical" benefits and "largely parallel[ ]" one another. Br. 2. But the article the government repeatedly cites as authoritative (Br. 3, 42, 44) emphasizes the many "key differences" between the two statutes in both "funding and benefit structure." Kevin Whitman, *An Overview of the*

Railroad Retirement Program, 68 Soc. Sec. Bull. No. 2, at 41 (2008).

One obvious difference is that Social Security has nothing resembling the Railroad Retirement Act's Tier 2, which is akin to a private pension program based on earnings and career service. *See* 45 U.S.C. § 231b(b). As a result, the railroad retirement system provides more generous benefits than Social Security. Of course, it also imposes significantly higher tax rates. *See* Pet. Br. 45-46. The government attempts to mask these differences by ignoring the railroad retirement system's Tier 2, and arguing that *Tier 1* is analogous to Social Security. But there are differences here as well. For example, Tier 1 allows railroad employees to retire at age 60 with 30 years of service, which Social Security does not. *See* 45 U.S.C. § 231a(a)(1)(ii).

If Congress had wanted railroad employees to get Social Security benefits and be subject to FICA taxation as most other industries are, it would not have created the two tiers in the 1970s. Instead, it would simply have deleted 26 U.S.C. § 3121(b)(9)—the provision that exempts railroads from FICA—and left the railroad retirement program as just the Tier 2 pension system.

4. The government contends that adopting its interpretation will preserve the solvency of the railroad retirement program. But there is no threat to solvency: It is undisputed that the amount of tax in dispute is less than 2 percent of the overall RRTA tax petitioners paid. Pet. Br. 14. Moreover, the RRTA's Tier 2 tax rates *automatically adjust* to ensure solvency. *See* 26 U.S.C. § 3241.

The government also warns against allowing employers to structure compensation as a way to

avoid taxes. Br. 43. But issuing stock options to employees is not some nefarious tax dodge. To the contrary, stock options are widely recognized and encouraged as a positive way to align the incentives of employers and employees.[3]

D. The IRS Regulation Does Not Support The Government And Does Not Deserve Deference.

The current IRS regulation does not say that stock is taxable under the RRTA. It does not even mention stock. Rather, it generally provides that RRTA "compensation" shall be given the same meaning as FICA "wages"—"except as specifically limited by the [RRTA]." 26 C.F.R. § 31.3231(e)-1. The restriction of the RRTA's tax base to "money remuneration," especially when compared to FICA's "all remuneration," plainly constitutes an RRTA-specific limitation.

If, as the government insists, the limitation to "money" remuneration is not a "railroad-specific limitation," that would mean the RRTA's tax base (money remuneration) and FICA's tax base (all remuneration) are the same—an outcome that indisputably would delete the word "money" from the RRTA. That interpretation would give RRTA "compensation" and FICA "wages" "the same meaning," 26 C.F.R. § 31.3231(e)-1, even though Congress defined them *differently*. Thus, if the

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[3] The government's argument (Br. 19-20) that senior railroad executives receive substantial awards of stock is beside the point. With limited exceptions, the RRTA taxes remuneration up to a specified cap. *See* 26 U.S.C. § 3231(e)(2). That cap is exceeded by the executives' cash salary, so the fact they receive stock has very limited effect on their RRTA tax liability.

regulation means what the government says it means, it fails *Chevron* step one because it conflicts with the statute.

The government argues that the regulation's reference to RRTA-specific limitations refers to limitations set forth in the exemptions to the RRTA's tax base, but not to limitations contained in the tax base itself. This is an unnatural "interpretive gerrymander[ ]" that is not supported by the language of the statute or the regulation itself. *Michigan v. EPA*, 135 S. Ct. 2699, 2708 (2015).

The regulation also fails *Chevron* step two because it is not a permissible interpretation. The government's argument that 26 U.S.C. § 3121(b)(9) is intended to prevent double taxation is only partly true. Its other purpose is to maintain railroad retirement as a separate and distinct system from FICA—a congressional judgment the government, through aggressive statutory "interpretation," should not be allowed to override.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

WISCONSIN CENTRAL, LTD,
GRAND TRUNK WESTERN RAILROAD COMPANY AND
ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of *Certiorari* to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads, many smaller freight railroads, Amtrak, and some commuter authorities.[1] AAR's members operate approximately 83 percent of the rail industry's line haul mileage, produce 97 percent of its freight revenues, and employ 95 percent of rail employees. In matters of industry-wide significance, AAR frequently appears on behalf of the railroad industry before Congress, administrative agencies, and the courts.

This case, which raises the question whether stock received by railroad employees is subject to payroll taxes levied under the Railroad Retirement Tax Act (RRTA), 26 U.S.C. §§3201-3241, presents such a matter of industry-wide significance. Taxes represent one of the largest expense for railroads. In 2016, the railroad industry paid approximately $12 billion in taxes, which included nearly $2.5 billion in payroll taxes. Ass'n. of Am. R.R., *Railroad Facts* 16 (2017 ed.). AAR routinely represents the railroad industry in tax-related matters before the courts and regulatory bodies, such as the Internal Revenue Service and the Railroad Retirement Board. AAR has filed *amicus* briefs with appellate courts and this Court in a number of important tax cases affecting the railroad industry (*e.g.*, *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277 (2011); *BNSF Ry. Co. v. United States*, 745

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[1] Both parties have consented to AAR's filing of an *amicus* brief. Pursuant to Rule 37.6, AAR states that no person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

F.3d 774 (5th Cir. 2014) (in support of petition for rehearing)). Because of the importance of the issue raised in this case, AAR participated as *amicus curiae* in the recent Seventh and Eighth Circuit cases raising the same issue, and filed an *amicus* brief with this Court in support of the *certiorari* petition in this case.

Here, the Court of Appeals issued an expansive interpretation of the term "compensation" under the RRTA which cannot be squared with the text, purpose, or history of the Act. The Court held that almost anything with market value is a "form of money remuneration," and thus subject to RRTA payroll taxes. This decision imposes a significant tax on non-money remuneration that Congress plainly did not intend to tax.

Thus, the question presented by this case has implications not just for Petitioners, the U.S. subsidiaries of Canadian National Railway Company, and their employees. It impacts all railroads in the United States that offer, have offered, or are contemplating offering stock to some of their employees. Therefore, all of AAR's members have a direct and significant interest in the issue before this Court.

SUMMARY OF THE ARGUMENT

The decision below should be reversed because it erroneously interprets the term "compensation" under the RRTA to include stock. The RRTA levies payroll taxes on "compensation" paid by railroad employers, and received by railroad employees, to fund benefits provided under the Railroad Retirement Act (RRA). 45 U.S.C. §§231–231v. Compensation is defined as "any form of money remuneration." The Government contends that compensation should be interpreted to mean the same thing as the term "wages," used in the

Federal Insurance Contributions Act (FICA), 26 U.S.C. §§3101 *et seq.*—the statute that funds Social Security benefits—even though "wages" are specifically defined as "all remuneration." The language used in the RRTA shows that Congress intended that the tax base for funding railroad retirement benefits was meant to be narrower than the tax base for funding Social Security benefits, and does not include stock.

The RRA and the Social Security Act (SSA) serve the same general purpose. However, they differ in a number of significant ways. The RRA provides two tiers of benefits: the first tier provides benefits that are essentially equivalent to Social Security benefits; the second tier provides retirement and other benefits that are not available to Social Security beneficiaries. To fund RRA benefits, the RRTA levies two tiers of payroll taxes on railroad employers and employees. The first tier of taxes is equivalent to the taxes Social Security employers and employees pay, but the second tier of taxes is paid only by railroad employers and employees. Another difference, which has been in the statutes from the beginning, is the definition of "compensation" and "wages."

In the wake of the great depression of the 1930s, Congress enacted both the SSA and RRA. The latter was railroad-specific legislation intended to address the particular circumstances of the railroad industry at the time. Among other things, the railroad retirement system was designed to address a pension crisis facing the railroad industry, which was the only industry that was already providing pensions to employees. In crafting the RRTA, Congress clearly made the choice to use the term "compensation" rather than "wages," and further, defined compensation differently

than wages, using narrower language that mirrored how railroad pensions were funded at the time. Congress did not intend to tax all forms of remuneration that a railroad employer could confer on its employees.

Creation of the railroad retirement system was neither the first, nor the last, time that Congress chose to enact railroad-specific legislation to address a subject differently for railroads than for other industries. Congress has done so in the areas of economic regulation (including tax policy), safety and employer liability, and labor relations. Thus, it should be no surprise that Congress chose to address the subject of retirement income security differently for the railroad industry and, more specifically, that it chose a different method for levying the payroll taxes that fund RRA benefits.

ARGUMENT

I. STOCK DOES NOT FALL WITHIN THE DEFINITION OF COMPENSATION UNDER THE RAILROAD RETIREMENT TAX ACT.

The issue presented here is the meaning of the term "money remuneration" used in the definition of "compensation" under the RRTA, and specifically, whether stock granted to employees falls within that term. 26 U.S.C. §3231(e)(1).

While money remuneration in the form of salaries and bonuses constitutes the core of a railroad employee's total compensation, other tools are used by railroad employers to reward and incentivize employees. One such tool is stock, which may be transferred to employees pursuant to nonqualified stock options, such as those involved in this case. Remuneration of this nature is deemed valuable because it gives

employees a direct stake in the company's fortunes, a point acknowledged by the court below. Pet. App. 3a. Indeed, Congress has sought to encourage employee ownership of employer stock, which is seen as a "device for expanding the national capital base among employees—an effective merger of the roles of capitalist and worker." *Donavan v. Cunningham*, 716 F.2d 1455, 1458 (5th Cir. 1983). *See* Pet. Br. at 12-13 for an explanation of the stock option program used by Petitioners, Canadian National's U.S. subsidiaries. All the large railroads utilize or have utilized stock options similar to Canadian National's program at issue in this case.

Arguing that stock transferred pursuant to nonqualified stock options is subject to payroll taxes, the Internal Revenue Service equates the term "compensation" used in the RRTA with the term "wages" used in FICA. 26 C.F.R. §31.3231(e)-1. But the words used in FICA to define "wages" are very different from the words used in the RRTA to define "compensation." FICA levies payroll taxes on "wages," which is defined as "*all remuneration* for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." 26 U.S.C. §3121(a) (emphasis supplied). In contrast, the RRTA defines "compensation" as "any form of *money remuneration* paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. §3231(e)(1) (emphasis supplied). Thus, the IRS's position that stocks are "money remuneration" derives from its decision, reflected in a 1994 regulation, to interpret very different language, used in different statutes, as if it meant the same thing. *See* Pet. Br. at 47 (noting that until 1994, the IRS interpreted "compensation" in the RRTA as "remuneration in money").

While not purporting to rely on the IRS regulation, the court below reached the same conclusion. Pet. App. 1a – 13a.[2] The court conceded that stocks may not have been considered money when the RRTA was enacted. Pet. App. 4a. But it dismissed the possibility that when Congress used the term "money" to define railroad employees' compensation it intended that what was considered "money" when the RRTA was enacted would continue to be the basis for defining the compensation that would be subject to payroll taxes in the future. When the history and purpose of the RRTA and RRA are examined it becomes clear that that is precisely what Congress intended. *See Perrin v. United States*, 444 U.S. 37, 42 (1979) ("words [in a statute] will be interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute").

A. The Railroad Retirement System and Social Security System are Different in a Number of Ways, Including the Manner in Which the Payroll Tax is Levied.

The court below observed that "'[t]he Railroad Retirement Tax Act . . . is to the railroad industry what

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[2] In reaching the same outcome as the Seventh Circuit, the Fifth Circuit granted deference to the IRS's interpretation under *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). *BNSF Ry. Co. v. United States*, 775 F.3d 743, 755-56 (5th Cir. 2015). On the other hand, when the Eighth Circuit addressed this issue, it concluded that "FICA sweeps more broadly than the RRTA," and, applying the "ordinary common meaning of" the term, held that "stocks . . . are not 'money'" and, therefore, that "the RRTA unambiguously does not require payment of RRTA taxes on remuneration in stock." *Union Pac. R.R. v. United States*, 865 F.3d 1045, 1048-53 (8th Cir. 2017).

the Social Security Act is to other industries.'" Pet. App. 2a. The railroad retirement system and Social Security system address the same general subject—retirement income security. Both systems have two statutory components: a statute that provides benefits, and a statute that funds those benefits. However, as a result of deliberate choices made by Congress they are distinct retirement systems that have taken different legislative paths, and that differ in significant ways.

The RRA, which initially provided basic retirement benefits and a very limited disability benefit, has been adjusted and expanded on numerous occasions since 1937. In 1938, an unemployment benefit was introduced. In 1946, the system was expanded to include survivor benefits, sickness benefits and an occupational disability benefit; the latter provides a benefit to employees suffering a disability that prevents them from performing their regular railroad job. 45 U.S.C. §231a(a)(1)(iv). Spousal benefits were added in 1951. *See* Kevin Whitman, *An Overview of the Railroad Retirement Program*, 68 Soc. Sec. Bulletin, No. 2, at 42 (2008). The Railroad Retirement Board, an independent agency in the executive branch of the federal government, has as its sole function administration of the railroad retirement system. 45 U.S.C. §231f.

In the early 1970s, a combination of inflation and past benefit increases raised concern in Congress over the future of the railroad retirement system and led to the creation of a commission to conduct a study and recommend changes to Congress "that would ensure adequate benefit levels on an actuarially sound basis." R.R. Ret. Bd., *Railroad Retirement Handbook,* at 3-4 (2015) (available at https://www.rrb.gov/Sites/default/files/2017-04/RRB%20Handbook%20%282015

%29.pdf). Ultimately, this resulted in enactment of the Railroad Retirement Act of 1974, which "fundamentally restructured" the railroad retirement system, primarily by splitting benefits into two distinct parts and eliminating the provisions which allowed retirees who qualified for both railroad retirement and Social Security benefits to receive benefits from both systems. *R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 168-69 (1980).

Today, the RRA provides two tiers of benefit. The first tier provides benefits that are essentially equivalent to those available to Social Security beneficiaries, but subject to railroad retirement age and service eligibility criteria. The RRA also provides a second tier of benefits, based entirely on an employee's railroad earnings, that are comparable to private multiemployer pension plans. Tier II provides an additional level of retirement benefits, as well as other benefits, which are not available to Social Security beneficiaries. These include the occupational disability benefit, which is broader than the disability benefit available under Social Security (which is limited to total and permanent disabilities). Tier II also provides supplemental retirement benefits that are available to certain employees who began service prior to October 1, 1981. 45 U.S.C. §231a(b). Eligibility requirements under the RRA differ from Social Security and, in some cases, are more favorable to long–term railroad employees. For example, railroad employees with 30 years of service can retire with unreduced benefits at age 60. 45 U.S.C. §231a(a)(1)(ii).[3]

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[3] Workers covered by the Social Security system are not eligible for an unreduced retirement benefit until between the ages of 66 and 67. 42 U.S.C. §416(l).

As a result of the 1974 legislation, tier II benefits are supported by additional payroll taxes on railroads and their employees that are not levied on Social Security employers and employees. R.R. Ret. Bd., *2017 Annual Report,* at 7 (2017), (available at https://www.rrb.gov/sites/default/files/2017-09/2017AnnualReport.pdf). The RRTA imposes separate payroll taxes on compensation paid by railroad employers and received by railroad employees to fund each tier of benefits. 26 U.S.C. §3201(a) & (b) (imposing tier I and tier II payroll tax on employees); 26 U.S.C. §3221(a) & (b) (imposing tier I and tier II payroll tax on employers). Tier I tax rates are the same as the Social Security payroll tax rates and fund the benefits that are comparable to Social Security benefits; the receipts from tier I payroll taxes ultimately are transferred to the Social Security and Medicare trust funds through a financial interchange established in 1951. *Railroad Retirement Handbook,* at 3, 46-47.

Separate and distinct tier II payroll taxes fund the benefits that are available to railroad employees but not to Social Security beneficiaries. Tier II taxes have a different earnings base (the maximum amount of earnings that is subject to the tax each year) than tier I taxes, and utilize a different rate for employees and employers, which can fluctuate year to year based on the "average account benefits ratio"—a ratio of fund assets to benefits and expenses. *Railroad Retirement Handbook,* at 46. A separate, additional payroll tax, levied on employers only, funds unemployment and sickness benefits, another aspect of the railroad retirement system that has no Social Security equivalent. *2017 Annual Report,* at 28. Thus, during the course of an employee's employment with a railroad, he or she, and the employing railroad, pay substantially more

payroll taxes than a similarly-situated non-railroad employee and employer.

One aspect of the RRTA that has not changed since 1935 is the definition of compensation; it was limited to "money remuneration" then, as it is today. As discussed above, among the differences between railroad retirement and Social Security is the language used to define "compensation" (in the RRTA) and "wages" (in FICA). These very different definitions were first enacted in 1935 by the same Congress. That same Congress chose to define wages under FICA far more broadly—and specifically to cover nonmonetary payments—than it defined compensation under RRTA. *Compare* 49 Stat. 639 (1935) *with* 49 Stat. 968, 974 (1935).[4] Congress purposefully did so.

B. The Historical Context of the Enactment of the Railroad Retirement and Social Security Statutes Explain the Difference in Each System's Payroll Tax.

The contours of a statute often are shaped by the specific goals that Congress was seeking to accomplish at the time the statute was enacted. The railroad retirement system and the Social Security system both emerged during the great depression of the 1930s, but the circumstances they addressed differed. Social Security was designed to initiate a comprehensive new system to provide retirement and disability income to workers in general, most of whom never had such coverage. However, unlike employers in other industries, many railroads already offered pensions to their

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[4] Congress reenacted the RRTA in 1937 in response to a constitutional challenge, again using the phrase "money remuneration." 50 Stat. 435, 436. *See infra* pp. 12.

employees—the first originating in the 1870s—although the adequacy and financial stability of some was precarious, a situation that was exacerbated by the economic conditions during the 1930s. David B. Schreiber, *The Legislative History of the Railroad Retirement and Railroad Unemployment Insurance Systems* 1-2 (1978); *Railroad Retirement Handbook*, at 1. As the economic crisis of the 1930s further weakened the private railroad pension system, support increased for a national pension system. By then, retirement security had become a matter of concern across economic sectors.

The then-proposed Social Security system "did not offer a solution to the problems in the railroad industry." Schreiber at 15, n. 69. It would not begin paying benefits immediately, and would provide no credit for service prior to 1937. *Railroad Retirement Handbook*, at 1. As a result, many railroad pensioners and long-term employees would have been left without benefits. Therefore, Congress elected to establish a separate retirement system for the railroad industry, creating a new federalized railroad pension to be financed by taxes levied on railroads and their employees. *Railroad Retirement Handbook*, at 1-2.

In addition to establishing a single, comprehensive retirement security system, the new statute was intended to facilitate the retirement of many older railroad workers. *See Hisquierdo v. Hisquierdo*, 439 U.S. 572, 573-74 (1979) ("[T]he Act would encourage older workers to retire by providing them with the means to enjoy the closing days of their lives with peace of mind and physical comfort, and so would assure more rapid advancement in the service and also more jobs for younger workers.") (internal quotations omitted). At its inception, the new system became

responsible for making payments to nearly 50,000 railroad pensioners. *Railroad Retirement Handbook*, at 2.

A federal pension had never been established before, especially one designed to replace private pensions. During an era when *Lochner* jurisprudence still prevailed, Congress anticipated constitutional challenges and a Supreme Court that was skeptical of New Deal legislation. Indeed, the first railroad retirement statute was challenged and held to be unconstitutional by this Court. *R.R. Ret. Bd. v. Alton R.R.*, 295 U.S. 330 (1935). Nonetheless, the quest to strengthen the retirement income security of railroad workers had taken root, and the effort continued.[5] Ultimately, negotiations between rail labor and management, urged by President Roosevelt, produced a compromise enacted into law as the Railroad Retirement Act of 1937 and the Carriers' Taxing Act of 1937 (renamed the RRTA in 1946. *See* 60 Stat. 722). *See* Schreiber, at 17-21.

The circumstances surrounding creation of the railroad retirement system offer a logical explanation for the different language Congress used when drafting the railroad retirement statute and Social Security statute. Before enactment of these statutes, funding of railroad pension plans typically was based on an employee's base pay, base salary, or regular pay—*i.e.*, based on each employee's *money* remuneration. Railroad employees often received non-money benefits as well, such as food, lodging, and transportation, but the

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[5] A new railroad retirement law was enacted in 1935, structured in a way that Congress hoped would avoid the constitutional infirmities of the original Act. *Railroad Retirement Handbook*, at 2. Nonetheless, this law too was held unconstitutional in part by a district court. *Alton R.R. v. R.R. Ret. Bd.*, 16 F. Supp. 955 (D.D.C. 1936).

value of those benefits was not used to compute retirement pensions. MURRAY LATIMER, INDUS. PENSION SYS. IN THE UNITED STATES AND CANADA 20-21, 106-12, 133-38 (1932). Additionally, many railroads offered employees stock-purchase plans, not dissimilar to the plans at issue here. Nat'l Indus. Conference Bd., *Studies in Industrial Relations: Employee Stock Purchase Plans* 18-22 (1928 ed.). These too were not included in the calculation of employee pension benefits. *See BNSF Ry.*, 775 F.3d at 755 ("[A]t the time the RRTA was enacted existing railroad pension plans were based on an employee's cash compensation only, rather than on other, broader types of compensation, despite the fact that some railroad companies apparently offered stock-option benefits.") Thus, in devising a program to replace the ailing private railroad pension system, Congress utilized a similar funding method, under which benefits were funded based only on monetary remuneration. *See* Pet. Br. at 26 (explaining how Congress anticipated that taxable "pay roll" would equate with employees' salaries reported to the Interstate Commerce Commission). And Congress has never changed the statute to provide otherwise.

In reading the term "money remuneration" broadly—beyond, by its own admission, what was considered to be money at the time—the court below noted that doing so made "good practical sense" because it created proper incentives for the structuring of compensation packages. Pet. App. 5a. Regardless of whether the court's point has merit as a matter of policy, it is not a judgment that should play a role in the interpretation of clear statutory language. *See Henson v. Santander Consumer USA, Inc.*, 137 S. Ct. 1718, 1725 (2017) (when the statutory language dictates otherwise, courts should not construe the statute to advance a presumed policy objective, nor be swayed by policy

concerns that did not appear to motivate Congress at the time).

II. RETIREMENT INCOME SECURITY IS NOT THE ONLY AREA WHERE CONGRESS HAS CHOSEN TO ADDRESS RAILROADS DIFFERENTLY THAN OTHER INDUSTRIES.

A. The Railroad Industry's Industrial Dominance During the First Century of its Existence Led Congress to Enact a Series of Unique Railroad Statutes, Beginning with Economic Regulation.

Echoing the court below, the Government has referred to the RRTA and FICA as "parallel" statutes, but that does not advance its case. Pet. Br. of the United States at 2, 11. On a number of occasions Congress has elected to address a subject in the railroad industry through a different, albeit to some extent parallel, statutory scheme than that used for other industries. As with retirement income security, Congress has taken this approach because it intended to treat railroads differently. Where Congress has done so, instead of striving to construe the statutes the same way, courts should be cognizant of, and give effect to, the differences between those statutes and different language used in parallel provisions of those statutes. *See Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 62-63 (2006) (The use of different words, especially in similar statutes, is strong evidence that "Congress intended its different words to make a legal difference.").

Congress has, on more than one occasion, enacted laws specifically aimed at railroads. *Railroad Retirement Handbook,* at 1 (Prior to enactment of the RRA

"[n]umerous laws pertaining to rail operations and safety had already been enacted" and "[s]ince passage of the [RRA], numerous other railroad laws have subsequently been enacted."). Congress has taken this approach in the areas of economic regulation, safety, employer liability, and labor relations. Often, Congress has included both large and small differences in the language of the railroad statutes as the result of deliberate policy choices made in recognition of the industry's unique history and characteristics. Underscoring that point in the context of the Railway Labor Act (RLA) and the National Labor Relations Act (NLRA)—statutes addressing labor relations in the railroad (and airline) industry and industry in general, respectively—this Court admonished that "parallels . . . should be drawn with the utmost care and with full awareness of the differences between the statutory schemes." *Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 578, n.11 (1971). *See infra* pp. 20-22.

In response to the railroad industry's emergence as the dominant form of interstate commerce in the second half of the nineteenth century, Congress aimed its first effort to comprehensively regulate an industrial sector at the railroad industry. Interstate Commerce Act of 1887, c.104, 24 Stat. 379. This regulatory scheme developed against the backdrop of a common law common carrier obligation, which required railroads to "carry for all persons who applied," at "reasonable" charges, *I.C.C. v. Baltimore & Ohio R.R.*, 145 U.S. 263, 275 (1892), an obligation now incorporated into federal statute. 49 U.S.C. §11101(a); *see also* 49 U.S.C. §10703 ("Rail carriers . . . shall establish through routes . . ."). Indeed, the railroad industry has long been viewed by Congress as a vital and necessary component of national commerce, war-

ranting the imposition of certain obligations, as well as certain protections, as a means of advancing public policy.

Congress has long taken an interest in the economic fortunes of the railroad industry, first through pervasive regulation, and more recently through deregulatory efforts embodied in the Staggers Rail Act, Pub. L. 96-448, 94 Stat. 1895 (1980) and the ICC Termination Act, Pub. L. 104-88, 109 Stat. 803 (1995); *Compare Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981) ("The Interstate Commerce Act is among the most pervasive and comprehensive of federal regulatory schemes.") *with Fayus Enters. v. BNSF Ry. Co.*, 602 F.3d 444, 450 (D.C. Cir. 2010) (ICCTA altered the law "entirely in a deregulatory direction").

One area where Congress has singled out railroads—in this case to grant protections—is tax policy. Concluding that historically railroads had been "overtaxed," Congress enacted section 306 of the Railroad Revitalization and Regulatory Reform Act, Pub. L. 94-210, § 306, 90 Stat. 31, 54 (1976); *See Burlington N. R.R. v. Okla. Tax Comm'n,* 481 U.S. 454, 457 (1987). This provision prohibits states from imposing discriminatory taxes on railroads, a widespread and longstanding practice that Congress found "unreasonably burden[ed] and discriminate[d] against interstate commerce." 49 U.S.C. §11501. Congress took note of the particular circumstances facing railroads that made them "easy prey for State and local tax assessors." Discriminatory State Taxation of Interstate Carriers, S. Rep. No. 91-630, at 3 (1969). Interstate rail operations depend on enormous capital investments, which once made are essentially immovable, rendering them captive to the taxing state. *Id.*

Moreover, the normal political restraints that might inhibit excessive and discriminatory taxation did not apply to out-of-state companies like railroads. *Id.* This Court has frequently been called upon to ensure that railroads are able to enforce their rights under §306. *E.g., Ala. Dep't of Revenue,* 562 U.S. 277 (2011); *CSX Transp., Inc. v. Ga. State Bd. of Equalization,* 552 U.S. 9 (2007).

B. Congress Has Chosen to Maintain Different Treatment for Railroads in the Areas of Safety and Employer Liability.

Economic regulation was not Congress' only effort directed uniquely at railroads in the late nineteenth century. To address concerns over safety, Congress enacted a series of laws aimed at discrete hazards posed by railroad operations. *E.g.*, Safety Appliances Act, c. 196, 27 Stat. 531 (1893); Boiler Inspection Act, c. 103, 36 Stat. 913 (1911); *See Johnson v. Southern Pac. Co.,* 196 U.S. 1, 19 (1904) (in four annual messages to Congress, President Harrison implored Congress to take legislative action to address the dangers of coupling rail cars, finally culminating in enactment of the first Safety Appliances Act). These laws prescribed specific requirements for railroad components and locomotives, and remain major components of railroad safety regulation today.

In 1970, Congress went even further when it enacted the Federal Railroad Safety Act, Pub. L. No. 91-458, 84 Stat. 971 (1970), which granted the Secretary of Transportation plenary power to "prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. §20103(a). The Secretary's authority to promulgate rail safety regulations is delegated to the Federal Railroad Administration (FRA),

an agency within the Department of Transportation. 49 C.F.R. §1.89. Outside the railroad industry, workplace safety is governed by the Occupational Safety & Health Act, which is enforced by the Occupational Safety & Health Administration (OSHA), 29 U.S.C §§651 *et seq.*, an agency within the Department of Labor. Where FRA has exercised jurisdiction over railroads—which includes the areas of track and roadbed, rail equipment and human factors—it displaces regulations issued by the OSHA. *See* Fed. R.R. Admin., *R.R. Occupational Safety and Health Standards; Termination*, 43 Fed. Reg. 10,584 (1978).

Focus on the safety of railroad employees led Congress to enact another statute directed at the railroad industry. Motivated by a high casualty rate among railroad workers during the early years of the twentieth century, Congress enacted the Federal Employers' Liability Act (FELA) to provide railroad workers who were injured on the job with a tort-based remedy. 45 U.S.C. §§51-60. FELA modified some of the harsher aspects of early twentieth century common law that made recovery difficult for injured workers, such as the assumption of the risk and fellow servant doctrines. H.R. Rep. No. 1386, at 1 (1908); 45 U.S.C. § 54; *Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U.S. 310, 313 (1916). FELA also eliminated the prevailing rule that barred recovery entirely if the worker's negligence contributed to the injury, which was replaced with a comparative negligence scheme. 45 U.S.C. § 53.

FELA was a unique statute when it was enacted, and employer liability remains an area where Congress has maintained a different approach to railroads. Shortly after FELA's enactment, individual states began to enact no-fault workers' compensation laws. That conceptually different approach to employer

liability soon became firmly established when its constitutionality was upheld by this Court. *N.Y. Cent. R.R. v. White*, 243 U.S. 188 (1917). Eventually, all states enacted no-fault workers' compensation laws.[6] In contrast to FELA, under these laws, employees who are injured on the job are entitled to compensation without regard to negligence, their employer's or their own.

Although no-fault workers' compensation laws today apply nationwide to virtually all employers outside the railroad industry, Congress has chosen to leave FELA intact as the exclusive remedy of railroad employees against their employer for workplace injuries, superseding all state laws. *S. Buffalo Ry. v. Ahern*, 344 U.S. 367, 371 (1953); *see Stone v. N.Y., C., & St. L. R.R.*, 344 U.S. 407, 410-11 (1953) (Frankfurter, J., dissenting) (lamenting Congress' decision not to replace FELA with a no-fault system of compensation); *Bailey v. Cent. Vermont Ry., Inc.*, 319 U.S. 350, 358 (1943) (Roberts, J., dissenting) (same). While Congress has for the most part left the subject of employer liability to the states, where it has addressed that subject for non-railroad employees within its jurisdiction, rather than adopt the approach taken for the railroad industry, it has followed the no-fault approach. General Accounting Office, *Workers' Compensation: Selected Comparisons of Federal and State Laws* 1 (April 1996). *See* Federal Employees' Compensation Act, 5 U.S.C. §8101 *et seq.*; Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§901-950.

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[6] Price V. Fishback and Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States*, 41 J.L & Econ. 305, 319-20 (1998).

C. Congress Has Chosen to Utilize a Different Approach to Address Labor Relations in the Railroad Industry.

As with employer liability, labor relations—the process of determining whether employees are represented by a union; the negotiating process between employers and unions; the resolution of contract disputes; and the conduct of parties during each phase of the relationship—is governed by a different federal law for railroads than for virtually all other industries. The RLA (which also applies to the airline industry) was enacted in 1926, predating by nearly a decade Congress' decision to address labor relations in industry in general. 45 U.S.C. §§151-162. When Congress did so, by enacting the NLRA, 29 U.S.C. §§151-169, it expressly excluded employees covered by the RLA. 29 U.S.C. §152(2) & (3) (definitions of "employer" and "employee").

As in other areas, history played a role in the different treatment of railroads in the labor area. By the late nineteenth century, unions were well established in the railroad industry, and rail labor and management had had a contentious relationship for several decades prior to enactment of the RLA. *See In re Debs,* 158 U.S. 564 (1895). This included a major strike in 1877 that eventually led to federal intervention, followed by several federal laws aimed at various aspects of rail labor-management relations.[7] The railroads were nationalized during World War I, and when they were returned to private control after the war ended, a new effort to address labor-management

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[7] Arbitration Act, 25 Stat. 501 (1888); Erdman Act, c. 370, 30 Stat. 424 (1898); Newlands Act, c. 6, 38 Stat. 103 (1913); Adamson Act, c. 436, 39 Stat. 721 (1916).

relations in the railroad industry was made in the Transportation Act of 1920. It was widely seen as a failure. *See Chicago & N.W. Ry. Co.*, 402 U.S. at 580. Railroads and their unions then entered into negotiations that eventually led to the passage of the RLA. *See Inter'l Ass'n of Machinists v. Street*, 367 U.S. 740, 758 (1961).

Outside of the railroad industry, labor was less organized. Indeed, courts of that era were perceived as being hostile to organized labor. *E.g., Loewe v. Lawlor*, 208 U.S. 274 (1908) (conduct of union held to be within purview of the Sherman Act). Consequently, the focus of the NLRA differed from the RLA, with the NLRA placing greater emphasis on facilitating, and removing impediments to, the right of labor to organize. In contrast, the RLA emphasizes the obligations to "make and maintain agreements" and "to settle all disputes." *Compare* 29 U.S.C. §151 *with* 45 U.S.C. §152 *First*.

The RLA and the NLRA share some basic goals: granting the right of employees to organize and bargain collectively; prohibiting interference with these rights by employers; and granting the right to negotiate legally enforceable collective bargaining agreements. Each statute establishes an administrative agency—the National Mediation Board (NMB) under the RLA (45 U.S.C. §154), and National Labor Relations Board (NLRB) under the NLRA (29 U.S.C. §153)—to oversee the processes established by each law. The RLA also establishes a National Railroad Adjustment Board to hear disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions that are not resolved through the applicable internal procedures at the railroad. 45 U.S.C. §153 *First* (i).

However, notwithstanding their similar goals and parallel structure, just as is the case with the railroad retirement system and Social Security system, there are significant differences between the RLA and NLRA. The NLRA spells out specific "unfair labor practices," conduct prohibited by management and labor. 29 U.S.C. §158. In contrast, the RLA imposes certain duties on labor and management. 45 U.S.C. §152. For the most part, rights under the RLA are enforceable in court rather than by the NMB, *Chicago & N.W.*, 402 U.S. at 581, while the NLRB has a much greater role in enforcing rights under the NLRA. The RLA and NLRA also set forth different approaches with respect to union elections. *Compare* 45 U.S.C. §152 *Ninth with* 29 U.S.C. §159. Finally, the RLA takes a far more interventionist approach to the resolution of labor disputes than does the NLRA, setting forth a drawn-out process for negotiating new labor agreements that must be followed before the parties may resort to self-help. *See* 45 U.S.C. §§155 *First*; 156; 160.

* * *

Given the historical context in which RRA/RRTA and SSA/FICA were adopted, it is no surprise that Congress chose to enact different statutory retirement systems for railroads and employers in general, and that among the differences is the approach to the payroll taxes that fund the respective systems. There is no question that Congress made the choice to define the two different terms "compensation" and "wages" differently, using narrower language in the RRTA that demonstrates an intent not to tax all forms of remuneration that a railroad employer might confer on its employees. Instead, as evidenced by the plain language used, Congress chose to limit such taxation

to any form of *money* remuneration, consistent with how railroad pensions were calculated at the time.

The starting point for the interpretation of a statute is always its language. *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989). The court below ignored the clear differences in the statutory language in order to achieve the similar treatment that it assumed Congress intended. This Court should not follow suit. Rather, this Court should take Congress' decision to use plainly different statutory language as indicative of Congress' intent to achieve different treatment under the two statutes, just as Congress has in its treatment of railroads in many other areas.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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No. 17-530

In the Supreme Court of the United States

WISCONSIN CENTRAL, LTD., ET AL.

v.

UNITED STATES OF AMERICA

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF OF CSX CORPORATION AND UNION PACIFIC RAILROAD COMPANY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

CSX Corporation and Union Pacific Railroad Company are two of America's premier railroads. Same as the railroads in this case, CSX and Union Pacific are seeking refunds of RRTA taxes for themselves and their employees—CSX's case is pending in the Eleventh Circuit (No. 17-12961), and Union Pacific's case is pending in this Court (No. 17-1002). Both *amici* have a clear interest in defending their long-held view that corporate stock is not, and never has been, a form of money.*

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* No party or counsel for a party authored or contributed monetarily to the preparation or submission of any portion of this brief. Counsel of record for all parties received notice of CSX's and Union Pacific's intention to file this brief more than 10 days before it was due, and all parties have consented to its filing.

SUMMARY OF ARGUMENT

In prior cases, the government has argued that giving the word "money" in Section 3231(e)(1) its original, ordinary meaning renders superfluous the exclusions in (e)(1)(i), (e)(5), (e)(9), and (e)(12). All of those exclusions were enacted decades after Congress defined "compensation" as a "form of money remuneration," and at the moment each was enacted, none was superfluous. They had meaning and purpose consistent with interpreting "money" as a "commonly accepted medium of exchange." Any superfluities that appear today are the result of post-enactment developments that do not change the original meaning of anything in Section 3231.

ARGUMENT

I. THE GOVERNMENT STRETCHES THE RULE AGAINST SUPERFLUITIES TOO FAR.

To get around the ordinary meaning of "money" in the RRTA, the government has argued that some exclusions in Section 3231(e) would do nothing and be unnecessary if "money" means "a commonly accepted medium of exchange." To varying degrees, lower courts have been persuaded by the government's argument. See *BNSF Railway Co.* v. *United States*, 775 F.3d 743, 754 (CA5 2015); *Wis. Central* v. *United States*, 856 F.3d 490 (CA7 2017). But the argument is wrong, for it is based on a mischaracterization of the rule against superfluities.

The rule against superfluities is simply a preference for statutory interpretations that give all of a statute's text meaning or purpose. The rule is not a command to eliminate technically unnecessary language from the law. Repetition, redundancy, and il-

lustrations are all technically unnecessary, but they also are ordinary speaking and writing conventions. See *Fort Stewart Schools* v. *FLRA*, 495 U.S. 641, 646 (1990). Congress has filled the U.S. Code generally, and the Tax Code in particular, with technically unnecessary words and phrases that are nevertheless useful and that nevertheless serve a purpose. See, *e.g.*, *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 226 (2008). Section 61, the foundational definition of "gross income," defines it capaciously as "all income from whatever source derived," then lists a number of examples of things that count as "gross income." 26 U.S.C. § 61. The examples in Section 61 are not problematic superfluities because they emphasize and clarify congressional intent.

In recent cases, this Court has admonished parties that have elevated the rule against superfluities into something more than just a rule of thumb. In this case, the government is trying more of the same. Looking at Section 3231(e) as it stands today, the government contends that some exclusions appear to do nothing if the word "money" takes its ordinary meaning. And so, the government argues that "money" should not take its original, ordinary meaning ("a commonly accepted medium of exchange"), but instead should be ignored as a meaningless modifier.

The government's approach to the rule against superfluities commits a double fault. The first fault is this: the rule is not a license to ignore the plain meaning of statutory words. See *Lamie* v. *U.S. Trustee*, 540 U.S. 526, 536 (2004). If giving "money" its ordinary meaning meant that one or more exclusions in Section 3231 had no practical effect, so be it.

But that's not even an issue. For the second fault in the government's argument is in portraying some

of Section 3231(e)'s exclusions as having no practical effect. Each does some work today, and each always has. Because the goal of statutory interpretation is to determine the *original* meaning of a statute, what a provision did *when enacted* is more important than what a provision does *today* for purposes of applying the rule against superfluities.

Below, we prove our points. When each exclusion the government attacks was enacted, it had meaning and purpose consistent with the original meaning of "money." Any superfluities that appear today are the byproducts of later legislation, which are not the kind of superfluities that violate the rule.

II. EVERY EXCLUSION FUNCTIONS WHEN "MONEY" TAKES ITS ORIGINAL, ORDINARY MEANING.

The Act now known as the RRTA became law in 1937. See Carriers Taxing Act of 1937, Pub. L. No. 174, 50 Stat. 435 (1937). In the RRTA's 1935 predecessor, Congress defined "compensation" as

> any form of money remuneration for active service, received by an employee from a carrier, including salaries and commissions, but shall not include free transportation nor any payment received on account of sickness, disability, or other form of personal relief.

Act of Aug. 20, 1935, Pub. L. No. 400, § 1, 49 Stat. 974 (1935). The government has pointed to the reference to "free transportation" as bolstering its position that "money" is a meaningless modifier, for why else would Congress exclude an in-kind, non-money benefit like "free transportation" from taxable "compensation" if "money" meant only "commonly accepted mediums of exchange"? See *BNSF*, 775 F.3d at 755. The answer is simple: free transportation was

not always provided in kind. It was sometimes provided in a commonly accepted medium of exchange—reimbursements or "*refunds* issued to persons entitled to free transportation." 1 Fed. Reg. 1,576, 1,577 (Oct. 13, 1936) (emphasis added). This exclusion, therefore, was not superfluous before it was declared unconstitutional.[1]

In contrast to the 1935 legislation, the RRTA had only two exclusions when it was enacted in 1937—one for tips and one for an employer's payment of the employee's share of RRTA taxes:

> The term "compensation" means any form of money remuneration earned by an individual for services rendered as an employee to one or more employers * * *. Such term does not include tips, or the voluntary payment by an employer, without deduction from the remuneration of the employee, of the tax imposed on such employee by section 2 of this Act.

50 Stat. 435, 436; accord 26 U.S.C. § 1532(e) (Supp. V 1939). For nearly forty years, those exclusions were the only two. See, *e.g.*, 26 U.S.C. § 1532(e) (1940); 26 U.S.C. § 3231(e)(1) (1976) (with newly added exclusions). And both, plainly, are consistent

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1 That's assuming the government is even right to call it an "exclusion." The reference to "free transportation" immediately followed a reference to "salaries and commissions." Read together, those references show that Congress was providing illustrations of what was, and was not, "money remuneration." "Salaries and commissions" would have been "money remuneration," and "free transportation" would not have, even if Congress had left them unmentioned.

with interpreting "money" as a commonly accepted medium of exchange.

The government has insisted that several exclusions added decades later by later Congresses are superfluous if the word "money" in Section 3231 takes its original, ordinary meaning. That is wrong. Below, we show how all of those exclusions—specifically, exclusions now codified in subsections (e)(1)(i), (e)(5), (e)(9), and (e)(12)—had meaning and purpose when they were enacted.

A. Subsection (e)(1)(i)

Current U.S. Code text

26 U.S.C. § 3231(e)(1)(i) excludes

> the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of sickness or accident disability or medical or hospitalization expenses in connection with sickness or accident disability or death, except that this clause does not apply to a payment for group-term life insurance to the extent that such payment is includible in the gross income of the employee.

Enactment history

When this exclusion was added in 1976, its text ended after the term "accident disability." See Act

to Amend the Railroad Retirement Act of 1974, Pub. L. No. 94-547, 90 Stat. 2523 (1976).

Congress added the underlined language in 1989. See Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 10205(a), 103 Stat. 2106 (1989).

The exclusion is not superfluous

The government's superfluity arguments about (e)(1)(i) mischaracterize (e)(1)(i) as, simply, an exclusion for health and life insurance—meaning, an exclusion of an in-kind benefit. But that's not what the law says. Since 1976, (e)(1)(i) has excluded "*any payment* * * * made to, or on behalf of, an employee * * * on account of sickness or accident disability or medical or hospitalization expenses." 26 U.S.C. § 3231(e)(1)(i) (emphasis added). And since 1989, (e)(1)(i) has excluded most "*payments*" for death benefits. *Ibid.* (emphasis added). A "payment" is usually made using a medium of exchange, like cash, checks, or direct deposit. Thus, the (e)(1)(i) exclusion is not superfluous when "money" takes its original, ordinary meaning.[2]

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2 The Seventh Circuit suggested that subsections (e)(6), (e)(10), and (e)(11) would be superfluous if "money" meant "commonly accepted medium of exchange," see *Wis. Central*, 856 F.3d at 492, but just like (e)(1)(i), all three of those subsections exclude mediums of exchange because they exclude "payment[s]."

B. Subsection (e)(5)

Current U.S. Code text

26 U.S.C. § 3231(e)(5) excludes

> any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 108(f)(4), 117, or 132.

Enactment history

When Congress added this exclusion in 1984, it cross-referenced only Sections 117 and 132. See Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 531(d)(2), 98 Stat. 494 (1984).

The cross-reference to Section 74(c) was added in 1986. See Tax Reform Act of 1986, Pub. L. No. 99-514, § 122(e), 100 Stat. 2085 (1986).

The cross-reference to Section 108(f)(4) was added in 2004. See American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 320(b), 118 Stat. 1418 (2004).

None of the cross-references is superfluous

In the past, the government has challenged only two of (e)(5)'s four cross-references as superfluous—the cross-references to Sections 74(c) and 132. (The other two cross-references obviously encompass money.) Below, we show that neither is superfluous because both exclude mediums of exchange in some way. Yet, even if they did not, there would be no superfluity because (e)(5) does not exclude only the exact same items that the cross-referenced sections exclude; it excludes anything that "it is reasonable to believe" they exclude. It is, at the very least, reasonable to believe that Sections 74(c) and 132 exclude

benefits paid in a medium of exchange, in no small part because those sections actually do exclude benefits paid in a medium of exchange.

Section 74(c): In 1986, (e)(5) was amended to cross-reference Section 74(c), in the exact same legislation that amended Section 74(c) to cross-reference the then-newly adopted Section 274(j). All were part of a comprehensive congressional effort to unify tax treatment of employee gifts and achievement awards. See Tax Reform Act of 1986, Pub. L. No. 99-514, § 122, 100 Stat. 2085 (1986). Under regulations in effect before the 1986 enactment, *anything* could count as an achievement award if its value was below a threshold amount. See 28 Fed. Reg. 6,499, 6,505 (June 25 1963); see also Economic Recovery Tax Act of 1981, Pub. L. 97-34, § 265, 95 Stat. 172 (1981) (raising the threshold to $400). Gift certificates, accordingly, could count as achievement awards back then, and some gift certificates—those akin to credit cards usable at a variety of retailers—"fall within the medium-of-exchange definition of money." *Union Pacific R.R. Co.* v. *United States*, 865 F.3d 1045, 1051 (CA8 2017). As the rule against superfluities requires, the Eighth Circuit correctly analyzed (e)(5)'s cross-reference to Section 74(c) within its original context.

The government has made an anachronous attack on the idea that (e)(5) excluded gift certificates when the cross-reference to Section 74(c) was added in 1986. Specifically, the government has argued that gift certificates do not count as achievement awards because a single IRS regulation, 26 C.F.R. § 1.274-3, requires that achievement awards be personal property. But that regulation didn't exist in 1986. It was promulgated in 1988, and not even to

implement Section 274(j), but to implement Section 274(b)(3)—a 1981 law that the 1986 law repealed. See Tax Reform Act of 1986, Pub. L. No. 99-514, § 122(c), 100 Stat. 2110.[3] The 1988 regulation applied only retroactively to the 1982 through 1986 tax years, see 53 Fed. Reg. 36,450, 36,450–51 (Sept. 20, 1988), so it clearly has nothing to say about the meaning or purpose of (e)(5)'s cross-reference to Section 74(c).

The cross-reference to Section 74(c) cannot be understood outside its original context. Consider that the latest version of Section 274(j) explicitly carves out gift certificates from the class of employee achievement awards. See 26 U.S.C. § 274(j)(3)(A)(ii)(I). That carve-out has no effect on the *original* meaning of (e)(5), though, because it is the product of a law that was enacted a few months ago and that applies only prospectively. See Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 13310, 131 Stat. 2054, 2132 (2017). The 2017 Congress that revised Section 274(j) clearly was not trying to change the meaning of "money" in the RRTA.

Section 132: Section 132 was added to the Code by the same law that added (e)(5). See Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 531, 98 Stat. 494 (1984). Both were part of a congressional effort to codify longstanding practices regarding fringe benefits. And so, the same legislation that added Section 132 to exclude specific fringe benefits also provided, for the first time ever, that all other fringe

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3 Regulations for Sections 74(c) and 274(j) were proposed in 1989, see 54 Fed. Reg. 627 (Jan. 9 1989), but never promulgated, see IRS Notice 92-12 (Mar. 26, 1992).

benefits must be included in individuals' gross income. See *id.* § 531(c); see also 26 U.S.C. § 61(a)(1).

Section 132 has grown over the years as Congress has increased the number of excludable fringe benefits. Originally, Section 132 excluded just four items: no-additional-cost services; qualified employee discounts; working condition fringes; and *de minimis* fringes. See Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 531(a)(1), 98 Stat. 878. All can be paid in forms of money (advances or reimbursements) just like railroads have long provided free transportation in the same forms of money. See Staff of Joint Committee on Taxation, GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984, at 838 n.68, 856 (Comm. Print 1984); see also Gazur, *Assessing Internal Revenue Code Section 132 After Twenty Years*, 25 VA. TAX. REV. 977, 982–92 (2006) (examining fringe-benefit practices that Congress codified in Section 132 and comparing them with railroads' free-transportation reimbursement practices). The Section 132 cross-reference in (e)(5), then, has always excluded some fringe benefits paid in a medium of exchange.

The government has argued that (e)(5)'s cross-reference to Section 132 is superfluous unless *each and every* item excluded by Section 132 can be paid in a form of money. That argument is wrong. By cross-referencing Section 132, Congress used simple and clear language to exclude from RRTA taxation any fringe benefits that might be paid in money. The cross-reference functions even if some fringe benefits might not be paid in money.

The government misunderstands the purpose of legislating by cross-reference within the Tax Code. Cross-references ensure uniformity of result—an

item excluded in one part of the Code will also be excluded in other parts. Because the Code is held together with such cross-references, future Congresses need only amend the ultimate, cross-referenced section to have a change ripple throughout the Code. Cross-references in a tax exclusion save current and future Congresses substantial time and attention.

The manifest purpose of (e)(5)'s cross-reference to Section 132 is to ensure that certain fringe benefits are not even *arguably* subject to RRTA taxation. That's why Congress wrote (e)(5) to exclude any fringe benefits that "it is reasonable to believe" are excluded under Section 132. That's why Congress inserted nearly verbatim exclusions in other taxing statutes simultaneously. See Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 531(d)(1)–(4), 98 Stat. 884 (adding four exclusions that cross-reference Section 132). After thirty years of amendments to Section 132, some of which have added money items and some of which have not, (e)(5)'s cross-reference to Section 132 still functions as intended. See, *e.g.*, 26 U.S.C. § 132(g)(1) (excluding qualified moving expense reimbursements—a form of money—as a fringe benefit). The cross-reference to Section 132, therefore, is not superfluous.

C. Subsection (e)(9)

Current U.S. Code text

26 U.S.C. § 3231(e)(9) excludes

> the value of meals or lodging furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119.

Enactment history

This exclusion was added in 1989. See Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 10207(a), 103 Stat. 2106 (1989); see also Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11704(a)(19), 104 Stat. 1388 (1990) (re-codifying this exclusion from (e)(10) to (e)(9)).

The exclusion is not superfluous

The meals-and-lodging exclusion cross-references Section 119's income-tax exclusions for employer-provided meals. One of those exclusions covers money: if an employee must pay an employer a fixed amount for meals even if the employee declines them, that fixed amount is excluded from the employee's income—as if the employer had never even paid the employee that money. See 26 U.S.C. § 119(b)(3). That exclusion existed before (e)(9) was added to Section 3231. See Act of Oct. 7, 1978, Pub. L. No. 95-427, § 4, 92 Stat. 996 (1978) (enacting Section 119(b)(3)).

D. Subsection (e)(12)

Current U.S. Code text

26 U.S.C. § 3231(e)(12) excludes

any remuneration on account of—

> (A) a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b)), or
>
> (B) any disposition by the individual of such stock.

Enactment history

This exclusion was added in 2004, in the same legislation that added nearly verbatim exclusions to three other tax statutes. See American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 251(a), 118 Stat. 1418 (2004).

The exclusion is not superfluous

Understanding (e)(12) requires understanding stock options. When an employee exercises an option, the employee *always* spends money and *always* receives stock from the employer. *Sometimes*, an employee receives more than stock at exercise. An employee might receive cash instead of fractional shares, and some qualified option programs pay employees bonuses or "additional compensation, in cash or property," at the time of exercise. 26 C.F.R. § 1.422-5(c). Finally, an employee *always* receives cash when he or she subsequently sells the stock that he or she had purchased from the employer at a discount.

How an option transaction is taxed *for income-tax purposes* depends on whether the option is qualified or non-qualified. For non-qualified options, everything is usually taxed at exercise. See 26 C.F.R. § 1.83-7. Qualified options are treated more favorably: any cash an employee receives at exercise is taxed at exercise, but the stock is taxed later, when the employee disposes of it, usually by selling it for cash. See 26 U.S.C. § 422(c)(2), 423(c); see also 26 C.F.R. § 1.422-5(c).

From their enactment, the two exclusions in the two subparagraphs of (e)(12) have ensured that any cash an employee receives in connection with a qualified stock option, whether at exercise or at sale, is not subject to RRTA taxation. The Fifth and Seventh

Circuits missed that purpose because they endorsed the government's mischaracterization of (e)(12) as, simply, "an exemption for qualified stock options." But by its plain language, (e)(12) excludes "*any remuneration on account of* (A) a transfer of stock to any individual [through qualified options] * * * or (B) any disposition * * * of such stock." 26 U.S.C. § 3231(e)(12) (emphasis added).

Thus, when (e)(12) was enacted in 2004, both parts of it had meaning and purpose consistent with the original, ordinary meaning of "money." The regulation making clear that cash bonuses may be paid at exercise of certain qualified options was promulgated before (e)(12) was enacted. See 69 Fed. Reg. 46,401 (Aug. 3, 2004). What's more, before (e)(12) was enacted, the IRS had taken the position that money an employee receives from a disqualifying disposition of qualified stock (*e.g.*, stock sold within a year of exercise) was subject to employment taxes. Basically, the IRS's view was that, because those proceeds count as "income" for income-tax purposes, those proceeds also should count as "wages" (FICA) and "compensation" (RRTA) for employment-tax purposes. See IRS Notice 2001-14 (Jan. 18, 2001). Employers disagreed and argued that employment taxes should not be assessed because employees alone control whether and when to sell their stock. See Wiggins, *Capital Gain v. Ordinary Income & the FICA Tax Treatment of Emp. Stock Purchase Plans*, 53 TAX LAWYER 703 (2000); Hevener & Batter, *Withholding on Stock Options after* Sun Microsystems, 24 TAX MGMT. COMPENSATION PLANNING J. 3 (1996). The IRS proposed regulations that rejected the employers' position. See 66 Fed. Reg. 57,023 (Nov. 14, 2001); see also IRS Notices 2001-72 & 2001-73 (Nov.

14, 2001). Amid the controversy that proposal generated, Congress rejected the IRS's position. The 2004 amendments vindicated employers by adding nearly verbatim exclusions to all relevant employment-tax statutes, including (e)(12)(B) in the RRTA.

From the employers' perspective, the new exclusions did not change the law because employers believed the IRS had been wrong to subject disqualifying dispositions to employment taxation. Still, the (e)(12) amendment served a purpose. It shielded disqualifying dispositions from the IRS's challenge and, at a minimum, "perform[ed] a significant function simply by clarifying" the law amid a debate about its reach. *United States* v. *Atl. Research Corp.*, 551 U.S. 128, 137 (2007); see *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371, 385–86 (2013); *Allison Engine Co.* v. *United States ex rel. Sanders*, 553 U.S. 662, 670 n.1 (2008). For this reason, at a minimum, (e)(12) was not superfluous upon enactment.

CONCLUSION

In the end, some of Section 3231(e)'s exclusions may cover only a few forms of money. But that's no problem. They need to cover only one form of money to defeat the government's contention that they cover none. The judgment of the Seventh Circuit should be reversed.

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No. 17-530

In the Supreme Court of the United States

WISCONSIN CENTRAL LTD.; GRAND TRUNK WESTERN RAILROAD COMPANY; AND ILLINOIS CENTRAL RAILROAD COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF NORFOLK SOUTHERN CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Norfolk Southern Corporation ("Norfolk Southern") is one of the nation's premier transportation companies, tracing its roots to the earliest days of American railroading. Its earliest predecessor, the South Carolina Canal and Railroad Company, was chartered in 1827, becoming one of the first railroads in America.

Norfolk Southern operates 19,500 railroad miles in 22 states and the District of Columbia, serves every major container port in the eastern United States, and provides efficient connections to other rail carriers. Norfolk Southern operates the most extensive intermodal network in the eastern United States and is a major transporter of coal, automotive, and industrial products.

Norfolk Southern employed an average of 28,044 people in 2016. In 2011, less than 5 percent of Norfolk Southern's remuneration to its employees was in the form of stock. Norfolk Southern disagrees with respondent's position on the proper treatment of stock payments under the Railroad Retirement Tax Act ("RRTA"). Rather than face Internal Revenue Service ("IRS") enforcement, collection, and penalty actions, Norfolk Southern has instead timely paid such disputed RRTA taxes on stock remuneration while it has long sought refunds for itself and its employees for those overpayments made contrary to

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[1] No counsel for any party authored this brief in whole or in part nor did any party make a monetary contribution to the brief. Petitioners and respondent consented to the filing of this brief.

the RRTA. The Court's decision in this case will have far-ranging effects on Norfolk Southern's past, present, and future tax liability.

STATEMENT

1. The railroad industry was the first to implement private employer pension plans, resulting in coverage of more than 80 percent of railroad workers by employer-sponsored pensions by the late 1920s. Railroad employees received considerable nonmonetary benefits, including lodging, food, and transportation, as a result of their employment with the railroads. Railroad employers, however, did not use these nonmonetary benefits to calculate an employee's pensionable compensation, basing these amounts instead on the employee's salary or base pay.

In the 1930s, the Great Depression aggravated an underfunding crisis in railroad pension plans. To protect the hard-earned pensions of railroad employees, Congress enacted a single railroad-specific scheme to federalize the then-existing plans. Congress funded the retirement benefits payable under the Railroad Retirement Act of 1937 ("RRA"), Pub. L. No. 75-162, 50 Stat. 307, through a payroll tax enacted in what is now the Railroad Retirement Tax Act or RRTA. *See* Carriers Taxing Act of 1937, Pub. L. No. 75-174, 50 Stat. 435; 26 U.S.C. § 3231(e).

Consistent with the then-existing railroad pension plans, the RRTA defined pensionable "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." *See* Carriers Taxing Act of

1937, Pub. L. No. 75-174, 50 Stat. 435, 436; 26 U.S.C. § 3231(e)(1). The definition did not include the substantial nonmonetary benefits railroad employers provided their employees.

2. Unlike railroad retirement, the Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935), was not designed to secure a pre-existing pension system on the verge of failure but was instead designed as an entirely new social system to provide retirement benefits in the future. Social Security's funding was achieved through a payroll tax known as the Federal Insurance Contributions Act ("FICA") tax. *See* 26 U.S.C. § 3101 *et seq.* The FICA tax swept far more broadly than the RRTA tax, extending to "wages" defined as "all remuneration . . . including the cash value of all remuneration (including benefits) paid in any medium other than cash." 26 U.S.C. § 3121(a).

Railroad employees were purposefully excluded from the Social Security system in light of their unique retirement-benefit system. In fact, almost 50 percent of the American workforce was originally excluded from the Social Security system, including domestic service and agricultural employees. William J. Nelson, Jr., *Employment Covered Under the Social Security Program 1935–84*, 48-4 Soc. Sec. Bull. 33, 33 (1985). These employees were excluded from Social Security because they, like railroad workers, received substantial nonmonetary compensation in the form of lodging, meals, and other benefits that were administratively difficult to calculate. Subsequent changes to Social Security brought domestic service and agricultural workers within the

fold but excluded all forms of nonmonetary compensation from FICA's reach.

It was not until the 1990s—nearly 60 years after the RRTA's passage—that the IRS took the position that RRTA "compensation" and FICA "wages" are coterminous. The IRS based this interpretation on a 1994 regulation providing that RRTA "compensation" has "the same meaning" as "wages" under FICA "except as specifically limited by the Railroad Retirement Act." *See* 26 C.F.R. § 31.3231(e)-1(a)(1).[2]

Norfolk Southern agrees with petitioners that the plain language of both the RRTA and the regulation mandates otherwise. Were there any doubt, however, the historical circumstances surrounding the RRTA's conception and enactment confirm the petitioners' reading. *E.g., Mohamad v. Palestinian Auth.*, 566 U.S. 449, 460 (2012) (finding it "telling" that the statute's drafting history "confirms what we have concluded from the text alone").

SUMMARY OF THE ARGUMENT

1. Before enactment of the RRA and RRTA, the majority of railroad employees received private pension benefits from their railroad employers. These private pension plans calculated benefits based on an employee's base pay or salary. The plans did not include stock or other nonmonetary benefits, such as lodging or meals, in their pensionable compensation.

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[2] Before the IRS issued the regulation in 1994, a Senate bill proposed modifying the definition of "compensation" under the RRTA to conform to the definition of "wages" under FICA, but the bill never left the Finance Committee. *See* Economic Growth Act of 1992, S. 2217, 102d Cong., tit. XLI.

When Congress federalized railroad retirement benefits to protect the pre-existing railroad pensions, it preserved the railroads' treatment of nonmonetary remuneration, limiting "compensation" only to "money remuneration" and excluding the substantial nonmonetary benefits, including stock, that railroads provided to their employees.

2. Separate and apart from its preservation of pre-existing railroad pensions, Congress enacted the Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935), to provide future old-age insurance benefits to American workers more generally. To fund Social Security, Congress imposed a tax, known as FICA, on "*all* remuneration." But Congress was forced to exclude a large swath of American workers from Social Security's reach. In particular, domestic service and agricultural workers were excluded from Social Security due to difficulties in defining their FICA "wages" in light of their receipt of substantial nonmonetary benefits, including housing and meals.

Two decades later, Congress brought domestic service and agricultural employees into the Social Security program. But to remedy the administrative difficulties, Congress limited FICA's otherwise more broad "all remuneration" to "cash remuneration," including monetary media of exchange, for these two groups. Thus, to the extent that the FICA regime informs the meaning of the separate and distinct RRTA tax, FICA's treatment of domestic service and agricultural employees—who, like railroad employees, receive considerable nonmonetary remuneration from their employers—confirms petitioners' reading. Like Congress's limitation for domestic service and

agricultural workers, its limitation to "money remuneration" for railroad employees should likewise be upheld.

ARGUMENT

I. The History Surrounding The RRTA's Enactment Demonstrates That "Money Remuneration" Does Not Extend To Stock

As detailed below, by the late 1920s, a substantial majority of railroad employees were covered by employer-sponsored pension plans that offered retirement benefits tied to employees' base pay. The railroad pension plans, however, were massively underfunded, a condition aggravated by the Great Depression. To protect the railroad pensioners' benefits, Congress adopted a comprehensive legislative solution to federalize the railroad pensions, including their calculation based on base pay.

A. Before The RRTA's Enactment, Railroad Employee Pensions Were Tied To Regular Pay, Base Pay, Or Base Salary

The first private pensions plans in the United States were created by railroads for railroad workers. *See* U.S. Gov't Accountability Off., GAO-18-111SP, The Nation's Retirement System: A Comprehensive Re-evaluation Is Needed to Better Promote Future Retirement Security 1 (2017); U.S. R.R. Ret. Bd., The Railroad Retirement System: Its First Seventy-Five Years 1 (2010), https://www.rrb.gov/sites/default/files/2017-05/NR1004.pdf.

In 1875, "[t]he American Express Company, a railroad freight forwarder, established the first pri-

vate pension plan in the United States in an effort to create a stable, career-oriented workforce." U.S. Gov't Accountability Off., *supra*, at 114. American Express pioneered a "noncontributory plan," meaning a pension to which employees were not required to contribute. *Id.* In 1880, the Baltimore & Ohio Railroad "established the second U.S. private pension plan, a contributory plan." *Id.* Thereafter, the Pennsylvania Railroad, Chicago & North Western, and Illinois Central railroads followed suit, establishing their own private pension plans. *Id.*

By the late 1920s, "more than 80 percent of railroad workers were employed by companies with existing pension plans." Kevin Whitman, *An Overview of the Railroad Retirement Program*, 68-2 Soc. Sec. Bull. 41, 41 (2008); *see also* U.S. R.R. Ret. Bd., *supra*, at 1. By the end of 1927, the railroad industry accounted for 42 percent of the estimated 4,000,000 American employees covered by private pension plans. *See* Murray W. Latimer, *Old Age Pensions in America*, 19 Am. Lab. Legis. Rev. 55, 61 (1929). The next most-covered industries—public utilities other than railroads and metal products—accounted for only 17 percent of covered employees a piece. *Id.*

Murray Latimer (one of the primary drafters of the Social Security Act and the first Chairman of the Railroad Retirement Board ("RRB"))[3] authored a two-volume treatise focusing on the growth and future of industrial pension plans in America. *See*

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[3] *See Murray Latimer, 84; U.S. Pension Architect*, N.Y. Times (Oct. 5, 1985), http://www.nytimes.com/1985/10/05/us/murray-latimer-84-us-pension-architect.html.

Murray Webb Latimer, *Industrial Pension Systems in the United States and Canada* (1933). Because railroads were the first private employers to offer pension plans, Latimer's study necessarily analyzed dozens of railroads and their pension plans.

Each railroad pension plan Latimer examined computed the railroad pensions solely on the basis of "base pay," "base salary," "regular pay," and other regular payroll amounts. 2 Latimer, *Industrial Pension Systems*, *supra*, at 1028–35.[4] During this time, railroads paid wages in cash, checks, hard currency, or, when necessary, scrip or merchandise orders. *See generally* Note, *Payment of Advance Wages in Trade Checks on Company Store*, 40 Yale L.J. 1105, 1105–06 (1931) (discussing "[t]he practice of paying wages in trade-checks, or scrip"); Nat'l Park Serv., *Scrip—A*

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[4] In many respects, these private railroad pension plans used the same definition of pensionable compensation that Congress used when enacting the Civil Service Retirement Act. *See* Act of May 22, 1920, Pub. L. No. 66-215, 41 Stat. 614. The Act created the Civil Service Retirement System ("CSRS") to provide federal employees retirement benefits. Congress defined pension benefits for federal employees by reference to "basic salary, pay, or compensation" and "exclude[d] from the operation of the Act all bonuses, allowances, overtime pay, or salary, pay, or compensation given in addition to the base pay of the positions as fixed by law or regulation." *Id.* at 615.

When designing the Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935), Congress, as with railroad employees, specifically excluded federal employees from its reach in light of their retirement coverage under CSRS. *See* Soc. Sec. Bd., Social Security in America 208 (1937); Wilmer L. Kerns, *Federal Employees' Retirement System Act of 1986*, 49-11 Soc. Sec. Bull. 5, 5 (1986).

Coal Miner's Credit Card (Feb. 19, 2016), https://www.nps.gov/biso/learn/historyculture/scrip.htm ("Scrip was used as a means of exchange in place of hard money, and it was issued in paper form as coupons or metal rounds called tokens.").[5]

In addition to such monetary media of exchange, railroads also provided substantial nonmonetary compensation to their workers, including meals, lodging, transportation, and stock. *See Shelton v. Missouri-Kansas-Texas R.R. Co.*, 74 F. Supp. 961, 962 (E.D. Mo. 1940) ("The practice of furnishing such meals and lodging to such employees was and is customarily followed by this defendant and other railroad companies. Such has been the custom for many years."); *Taxation of Interstate Carriers and Employees: Hearings on H.R. 8652 Before the H. Comm. on Ways and Means*, 74th Cong. 9 (1935) (statement of Rep. Robert Crosser); U.S. Eight-Hour Comm'n, Report of the Eight-Hour Commission, at 399–00, 402 (1918) (explaining that "some railroads encourage and assist their employees to buy homes"; some provide "[b]unk houses . . . for the accommodation of train crews obliged regularly to rest over between runs"; and some offer "vacation and transportation privileges, . . . a much esteemed feature of railway employment"); Nat'l Indus. Conf. Bd., *Employee*

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[5] Scrip was prohibited from use for Fair Labor Standards Act ("FLSA") purposes beginning in 1939, *see* 29 C.F.R. § 531.34 ("Scrip, tokens, credit cards, 'dope checks,' coupons, and similar devices are not proper mediums of payment under [FLSA]."), and its role as a circulating media of exchange began to die out in the American economy shortly after World War II.

Stock Purchase Plans in the United States, 204–06, 208–14 (1928).

Despite the prevalence of stock compensation, no railroad pension plan Latimer identified included stock in its definition of pensionable compensation. 2 Latimer, *Industrial Pension Systems*, at 1028–35. And the widespread nonmonetary compensation paid by the railroads such as food, lodging, and transportation were also not included in the plan documents for purposes of computing pension benefits. *Id.* Indeed, Latimer's study does not identify a single railroad pension plan that defined pensionable compensation as including nonmonetary payments of food, lodging, and transportation to railroad employees despite the industry's heavy use of such nonmonetary forms of compensation.

Instead, the retirement benefits and the requisite funding were based solely on the salary received by the workers in the form of monetary media of exchange. 2 Latimer, *Industrial Pension Systems*, at 1028–35; *see also* Latimer, *Old Age Pensions*, *supra*, at 60 ("Typical provisions of the non-contributory pension plans are: . . . One, 1.5 or 2 per cent of the annual average salary . . . ."); *id.* ("In a larger proportion of the contributory plans than of the non-contributory plans, the pension is based on the whole *salary* rather than on the final or last few years of service." (emphasis added)).

In sum, "at the time the RRTA was enacted existing railroad pension plans were based on an employee's cash compensation only, rather than on other, broader types of compensation, despite the fact that some railroad companies apparently offered

stock-option benefits." *BNSF Ry. Co. v. United States*, 775 F.3d 743, 755 (5th Cir. 2015).

B. Congress Enacted The RRTA To Secure Pre-Existing Railroad Pension Plans

Railroad employee pension plans were underfunded, a problem further exacerbated by the Great Depression. *See* Whitman, *supra*, at 41; Latimer, *Old Age Pensions*, *supra*, at 65 (noting "some doubts as to the ability of voluntary charity to continue to carry as large a share of responsibility as in the past"); U.S. Gov't Accountability Off., *supra*, at 116 (estimating unfunded liability of private pension plans in 1932 to be $2 billion).

The underfunding of railroad pension plans led to calls to federalize the system to protect railroad pensioners. *See* U.S. Gov't Accountability Off., *supra*, at 116 (Between 1931 and 1934, "[t]he Railroad Employees' National Pension Association (RENPA) called on the government to protect the railroads' pension system, which was at risk of failing."); Whitman, *supra*, at 41 ("The initiative for establishing a separate federal retirement program for railroad workers arose during the late 1920s as a response to the myriad problems facing the railroad industry's private pension plans."); U.S. R.R. Ret. Bd., *supra*, at 1 ("Railway labor sought legislation to continue railroad pensions as part of a reliable and equitable national program.").

In 1937, Congress enacted the RRTA. *See* Carriers Taxing Act of 1937, Pub. L. No. 75-174, 50 Stat.

435.[6] Consistent with the pre-existing railroad pension plans and their focus on base salary, the RRTA imposed taxes only on "money remuneration." *Id.*; *see also Taxation of Interstate Carriers and Employees: Hearings on H.R. 8652 Before the H. Comm. on Ways and Means*, 74th Cong. 3 (1935) (statement of Rep. Robert Crosser) ("The bill simply provides for a tax of 2 percent on all railroad workers in the United States, and a 4 percent excise tax on the railroads, based on the pay rolls for each year."). The RRTA's use of "money" instead of "cash" captured all monetary mediums of exchange—including the railroads' payment of scrip in lieu of cash wages—but excluded nonmonetary compensation such as meals, lodging, transportation and, as relevant here, stock payments.[7]

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[6] Congress's first enactment to protect railroad pensioners was the Railroad Retirement Act in 1934. The Act, however, was declared unconstitutional. *See R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935); *see also* Whitman, *supra*, at 41. In 1935, Congress enacted the Railroad Retirement Act of 1935, Pub. L. No. 74-399, 49 Stat. 967, and the corresponding taxing act, *see* Act of Aug. 29, 1935, Pub. L. No. 74-400, 49 Stat. 974. Though the industry-specific retirement tax was declared unconstitutional, *Alton R.R. Co. v. R.R. Ret. Bd.*, 16 F. Supp. 955 (D.D.C. 1936), the Railroad Retirement Board began paying benefits in July 1936 and awaited the final taxing legislation, Whitman, *supra*, at 41.

[7] This understanding was borne out in decisions issued shortly after the RRTA's enactment. *See Bhd. of Maint. of Way Emps. v. Nashville, Chattanooga & St. Louis Ry.*, 56 F. Supp. 559 (M.D. Tenn. 1944). In *Nashville*, the court addressed whether the cost of board could be included in computing "wages" for purposes of the FLSA. Though the court held that the railroad could treat the cost of board as "wages" to comply with FLSA,

II. Insofar As FICA Has Any Relevance, Congress Has Similarly Excluded Nonmonetary Remuneration For Domestic Service And Agricultural Workers

Unlike railroad retirement, the Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935), was "an unprecedented new form of social provision." *See* Larry DeWitt, *The Decision to Exclude Agricultural and Domestic Workers from the 1935 Social Security Act*, 70-4 Soc. Sec. Bull. 49, 54 (2010). But to the extent that the Social Security Act and its corresponding FICA tax informs construction of the RRTA at all, the treatment of railroad workers most closely aligns with the Social Security Act's treatment of domestic and agricultural workers whose non-cash remuneration FICA does not tax.

Like railroad workers, employees in the agricultural and domestic service industries received substantial amounts of nonmonetary forms of remuneration from their employers, including food, lodging, and transportation. *See, e.g.*, Soc. Sec. Bd., Social Security in America 208 (1937). The compensatory food, lodging, and transportation received by agricultural and domestic service workers provoked concerns about the administrative hurdles involved in determining these employees' remuneration. *See id.* ("Administrative difficulties suggested further limi-

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id. at 564, it explained that "[t]he cost to defendant Railway of furnishing board is *not included* in the amount of wages from which deductions are made *for the purposes of [RRTA]* which provides that the term 'compensation' means any form of money remuneration," *id.* at 561 (emphases added).

tations of coverage to eliminate, at least in the early years of a system, certain types of employments in which it would be difficult to enforce the collection of contributions. In the case of farm labor and domestic servants in private homes, . . . the usual provision of a part of compensation in the form of maintenance would greatly handicap effective enforcement.").

Congress initially resolved this issue by excluding these workers entirely from Social Security. *See* Nelson, *supra*, at 33. This proved unpopular because these two employment sectors comprised approximately 10 percent of the entire employee workforce within the United States at this time and nearly 25 percent of the employees excluded from Social Security. *Id.*

Social Security's Commissioner described the effort to overcome the administrative hurdles posed by agricultural and domestic service employees as "one of the toughest things that Social Security ever undertook." DeWitt, *supra*, at 63. To do so, Congress decided to limit FICA taxes for these groups to "cash remuneration" and monetary media of exchange; in other words, only money remuneration was taxed. *See* 26 U.S.C. § 3121(a)(7)(A) (excluding from "wages" "remuneration paid in any medium other than cash" for domestic service employees); § 3121(a)(8)(A) (same for agricultural labor).

In implementing regulations, the Treasury Department itself defined and continues to define the term "cash remuneration" for FICA purposes as follows:

> Cash remuneration includes checks and other monetary media of exchange.

> Cash remuneration does not include payments made *in any other medium*, such as lodging, food, clothing, car tokens, transportation passes or tickets, farm products, or other goods or commodities.

26 C.F.R. § 31.3121(a)(8)-1(f) (emphasis added); *see also* 26 C.F.R. § 31.3121(a)(7)-1(b) (defining "cash remuneration" for domestic workers using similar language).

And the Treasury Department defines "noncash remuneration" elsewhere in Subtitle C as follows:

> The term "noncash remuneration" includes remuneration paid in any medium other than cash, such as goods or commodities, *stocks*, bonds, or other forms of property. The term does not include checks or other monetary media of exchange.

26 C.F.R. § 31.3402(j)-1(c) (emphasis added) (implementing 26 U.S.C. § 3402(j), which allows employers to exempt noncash remuneration from income tax withholding for commissioned salespeople).

These statutory and regulatory exclusions still exist today and parallel RRTA's limitation to "money remuneration." In *Rowan Cos. v. United States*, 452 U.S. 257 (1981), this Court recognized that, in the tax context, "[c]ontradictory interpretations of substantially identical definitions do not serve" the interest of "promot[ing] simplicity and ease of administration." *Id.* at 257. The terms "money remuneration" and "cash remuneration" are far more similar

than "money remuneration" and FICA's "all remuneration." The terms "money remuneration" and "cash remuneration" should therefore be construed similarly.

The Treasury Department's own implementing regulations recognize the critical difference between property (such as stocks) as opposed to cash, money remuneration, and other monetary media of exchange. Property payments such as food, lodging, transportation, commodities, and stock are still excluded from FICA taxes for agricultural and domestic workers. Given the historical circumstances giving rise to these exclusions and the similar history of railroad workers, the RRTA's money limitation should continue to be respected just as it is for domestic service and agricultural workers for FICA purposes.

CONCLUSION

For the reasons provided above and in the petitioners' brief, this Court should reverse the judgment below.

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